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Supreme Court of the United States

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No. 25

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

CARDOX CORPORATION, PETITIONER,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1] [Caption omitted]

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-Two Fire Equipment Company, Petitioner,

vs.

John P. Barnes, Chief Judge of the United States District Court for the District of Illinois, Northern Division, Respondent

Application for Leave to File Petition for Writ of Mandamus—Filed October 29, 1951

Petitioner respectfully applies for leave to file the annexed Petition and accompanying brief on the grounds set forth therein.

Respectfully submitted, Irving Herriott, 120 South LaSalle Street, Chicago, Illinois, Attorney for Petitioner.

Pennie, Edmonds, Morton, Barrows & Taylor, R. Morton Adams, 247 Park Avenue, New York 17, New York, Of Counsel.

[fols. 5-6] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

Before Hon. J. Earl Major, Chief Judge

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Chief Judge of the United States District Court for the District of Illinois, Northern Division, Respondent

RULE TO SHOW CAUSE—October 29, 1951

Petitioner, having applied for leave to file a Petition for Writ of Mandamus in the above-entitled case, and such leave having been granted, it is ordered:

1. That a copy of this order and a copy of said Petition and supporting brief be served upon Respondent forthwith;
2. That Respondent file in this Court an original and four (4) copies of his Answer to the Petition for a Writ of Mandamus within thirty (30) days from this date.
3. That all proceedings in the Court below be and hereby are stayed until final determination of said Petition by this Court.

[fol. 7] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

PETITION FOR WRIT OF MANDAMUS—Filed October 29, 1951

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioner, C-O-Two Fire Equipment Company, a corporation organized and existing under the laws of the State of Delaware, but having its principal place of business in

Newark, New Jersey, files this, its petition for writ of mandamus to The Honorable John P. Barnes, Judge of the United States District Court for the Northern District of Illinois, directing him to nullify, vacate, and set aside an order entered by him on the 15th day of October, 1951, in a case entitled Cardox Corporation v. C-O-Two Fire Equipment Company, Civil Action No. 51C1007 in the United States District Court for the Northern District of Illinois, Eastern Division, denying a motion of petitioner for an order dismissing said action for improper venue; and either directing said Honorable Judge to dismiss said action for improper venue or to exercise his discretion and transfer said action to a district of proper venue; and for cause show:

I. Nature of the Suit and Proceedings

On June 26, 1951, petitioner, as defendant, was sued for alleged patent infringement by Cardox Corporation, as plaintiff, in the United States District Court for the Northern District of Illinois, Eastern Division. A copy of the [fol. 8] complaint is annexed hereto as Exhibit A.

The complaint alleged that the action arose under the Patent Laws of the United States and based venue on the allegation:

> "Defendant, C-O-Two Fire Equipment Company, is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois."

There is no allegation or contention that defendant, petitioner herein, had committed any acts of infringement within the Northern District of Illinois.

Defendant, petitioner herein, in order to secure the protection afforded defendants by the venue provision for patent infringement cases (28 U.S.C. 1400(b)) filed a motion on July 12, 1951 that the complaint be dismissed for improper venue. A copy of said motion and supporting affidavits are annexed hereto as Exhibit B.

The grounds of said motion were that Sec. 1400(b) of Title 28, United States Code had not been complied with in either of the statutory venue requirements; namely, that the suit had not been brought in the district of defendant's incorporation, or in the district where defendant had a regular and established place of business and had committed the alleged acts of infringement.

Affidavits of the President, Scott E. Allen and the Secretary, Ralph F. Batch, of the defendant company, submitted in support of said motion, established that, although defendant was licensed to do business and had a place of business within the Northern District of Illinois, such business as was transacted there, was not related to the alleged infringing acts and that defendant had committed no alleged infringing act within the Northern District of Illinois, but [fol. 9] that it had committed acts of the kind complained of in the State of New Jersey where defendant maintains its principal office and manufacturing plant, keeps all its books and records relating to the alleged infringing activities and where its officers, engineers and employees who are acquainted with the alleged infringing activities are located.

Defendant, petitioner herein, also suggested to the District Court, that instead of dismissing the action, it would be appropriate to transfer said action under the discretionary provision of Sec. 1406(a) of Title 28 United States Code.

Memoranda were filed on behalf of the plaintiff and defendant and the motion came on for hearing before The Honorable John P. Barnes on October 15, 1951. Judge Barnes declined to hear argument and decided the matter from the bench without formal opinion.

An order was entered denying defendant's motion on the 15th day of October, 1951. A copy of said order is annexed hereto as Exhibit C.

It is the action of respondent in entering this order and in retaining jurisdiction of the case and in refusing to dismiss or transfer the case for improper venue that petitioner prays be reviewed and corrected by this Court.

II. Basis of This Court's Jurisdiction

Jurisdiction in this Court is invoked pursuant to Sec. 1651(a) of Title 28, United States Code, which authorizes

the Courts of Appeal to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. *Fettig Canning Company* v. *Steckler*, 188 F. 2d 715 (7 Cir., 1951); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir., 1951); *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (5 Cir., 1950); *Shapiro* v. *Bonanza* [fol. 10] *Hotel Co.*, 185 F. 2d 777 (9 Cir., 1950); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2 Cir., 1950); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2 Cir., 1950); *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457 (9 Cir., 1951).

In all of the foregoing cases the Courts of Appeal entertained petitions for writs of mandamus on matters of venue.

III. Reasons for Allowance of Writ

Petitioner submits that this is an appropriate case under the above authorities for this Court to exercise its power to issue a writ of mandamus under Sec. 1651(a) of Title 28, United States Code, for the following reasons:

1. The District Court has retained jurisdiction over the action without authority in law. Petitioner has been deprived of its right given to it by Sec. 1400(b) of Title 28, United States Code to be sued where it is incorporated or where it has a regular and established place of business and has committed acts of infringement, even though it has seasonably objected to the deprivation of that right.

2. The injury to petitioner cannot be corrected by appeal from the order complained of because said order is interlocutory and is not appealable. It does not dispose of the case or any separate issue therein.

3. The injury to petitioner cannot be corrected upon appeal from final judgment because:

a. Petitioner will not be able to show that a different result would have been reached had the action been tried in the proper jurisdiction and,

b. The protection given to defendants by Sec. 1400(b) of Title 28 United States Code against the inconvenience and annoyance of having to defend a charge of [fol. 11] infringement in a district remote from the one where the alleged infringing acts took place or where defendant is incorporated, will be destroyed if defendant is compelled to go through a trial of the case on the

merits in the present district which is remote from Delaware where it is incorporated and from New Jersey where it has its principal office and has committed alleged acts of infringement. This statutory protection having been once destroyed by going through trial can never be recreated. The inconvenience and annoyance, once having occurred, cannot be wiped out and the injury is not susceptible of compensation by damages.

4. The question presented is an important matter on which this Court should rule not only in protection of defendant petitioner but also in the interest of the orderly administration of justice.

Wherefore petitioner prays:

(A) That an order be issued staying all proceedings in the Court below until the determination by the Court of this petition,

(B) That an order be issued directed to respondent, The Honorable John P. Barnes, Judge of the United States District Court for the Northern District of Illinois, to show cause, if any there be, why a writ of mandamus should not issue, said order to be returnable as promptly as the situation permits,

(C) That, upon determination by this Court, a writ of mandamus be issued, directing respondent to nullify, vacate, and set aside, the order entered the 15th day of October, [fol. 12] 1951 in said *Cardox Corporation* v. *C-O-Two Fire Equipment Company* denying petitioner's motion to dismiss said action and directing respondent to dismiss said action or in the alternative to exercise sound discretion and transfer said action to a district of proper venue, and

(D) That petitioner have such other and further relief as may be deemed to be proper and justifiable under all the facts and circumstances.

Irving Herriott, Montgomery, Hart, Pritchard and Herriott, 120 South LaSalle Street, Chicago, Illinois, Attorney for Petitioner.

R. Morton Adams, Pennie, Edmonds, Morton, Barrows and Taylor, 247 Park Avenue, New York 17, New York, Counsel for Petitioner.

[fol. 13] EXHIBIT "A" TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1007

Equitable Relief Sought

CARDOX CORPORATION, Plaintiff,

vs.

C-O-TWO EQUIPMENT COMPANY, Defendant

Complaint

1. Plaintiff, Cardox Corporation, is a corporation duly organized and existing under the laws of the State of Illinois with its principal place of business at 307 North Michigan Avenue in Chicago, County of Cook, and State of Illinois.

2. Defendant, C-O-Two Fire Equipment Company, is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois.

3. This action arises under the patent laws of the United States.

4. On January 10, 1939, United States Letters Patent No. 2,143,311 were duly and legally issued to Cardox Corporation, the plaintiff, as assignee of Eric Geertz, Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

[fol. 14] 5. On May 28, 1940, United States Letters Patent No. 2,202,343, were duly and legally issued to Cardox Corporation, the plaintiff, as assignee of Eric Geertz. Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

6. On March 3, 1942, United States Letters Patent No. 2,274,783 were duly and legally issued to Cardox Corpora-

tion, the plaintiff, as the assignee of Eric Geertz. Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

7. Defendant for some time past has been, and now is, aiding, abetting and contributing to the infringement of said Letters Patent No. 2,143,311 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus with the knowledge and intent that such apparatus will be and has been used by the purchaser for the purpose of utilizing the methods covered by said Letters Patent.

8. Defendant for some time past has been, and now is, infringing said Letters Patent No. 2,202,343 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus embodying the said patented invention.

[fol. 15] 9. Defendant for some time past has been, and now is, infringing said Letters Patent No. 2,274,783 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus embodying the said patented invention.

Wherefore, plaintiff demands a preliminary and final injunction against further infringment by defendant, an accounting for damages, an assessment of costs against defendant, and such other relief as to the Court may seem just.

Cardox Corporation, (S.) By Andrew J. Dallstream, 231 S. LaSalle Street, Chicago 4, Illinois; (S.) Frederic H. Stafford, 231 S. LaSalle Street, Chicago 4, Illinois; (S.) George I. Haight, 209 S. LaSalle Street, Chicago 4, Illinois, Attorneys for Plaintiff.

[fol. 16] EXHIBIT "B" TO PETITION

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1007

CARBOX CORPORATION, Plaintiff,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY, Defendant

Motion Under Rule 12b F.R.C.P. to Dismiss for Improper Venue

Now comes defendant, by its attorneys, Dawson and Ooms, appearing specially and moves that the Complaint herein be dismissed on the ground of improper venue.

In support thereof, defendant will rely on the following:

(a) defendant is a corporation of Delaware;

(b) the pleadings herein do not allege any acts of infringement within the Northern District of Illinois as required by 28 U. S. Code 1400(b);

(c) as shown by an affidavit of an officer of defendant company, submitted herewith no acts of infringement have in fact taken place within the Northern District of Illinois.

Casper W. Ooms, Owen J. Ooms, Dawson and Ooms, Attorneys for Defendant, 209 South LaSalle Street, Chicago, Illinois.

Of Counsel: R. Morton Adams, Edward F. Connors, New York City.

July 11, 1951.

[fol. 17] AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE

STATE OF NEW JERSEY,
County of Essex, ss:

I, Ralph F. Batch, being duly sworn, depose and say:

That I am the Secretary of the C-O-Two Fire Equipment Company.

That I am familiar with the business of the C-O-Two Fire Equipment Company.

That the C-O-Two Fire Equipment Company is a corporation of Delaware.

That the main office and manufacturing plant of the C-O-Two Fire Equipment Company is located in Newark, New Jersey.

I am advised that the three patents alleged in the complaint herein to be infringed numbered 2,143,311, 2,202,343 and 2,274,783 relate to low temperature fire extinguishing equipment.

That the C-O-Two Fire Equipment Company has never manufactured, used nor sold, nor caused to be manufactured, used nor sold, nor installed, nor caused to be installed, any low temperature fire extinguishing equipment, within the territory of the Northern District of Illinois.

(Signed) Ralph F. Batch.

Sworn to before me this 9th day of June, 1951.
(Signed) Elizabeth Gauld, Notary Public.

[fol. 18] In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action. No. 51C1007

Cardox Corporation, Plaintiff,

vs.

C-O-Two Fire Equipment Company, Defendant

Affidavit

State of New Jersey,
County of Essex, ss:

I, Scott E. Allen, being duly sworn, depose and say:

I am the president of the C-O-Two Fire Equipment Company, a Delaware corporation, organized and existing under the laws of the State of Delaware and maintaining its main offices and its factories in the City of Newark, State of New Jersey, within the District of New Jersey.

I am familiar with the business operations of the C-O-Two Fire Equipment Company.

This company manufactures and sells both so-called low-pressure fire extinguishing equipment and systems, and high-pressure fire extinguishing equipment and systems.

I am advised that the patents charged in this suit to have been infringed relate only to low-pressure equipment and systems. This company has never made, used or sold low-pressure equipment or systems within the Northern District of Illinois or committed any of the acts complained of within the Northern District of Illinois. It has made and sold such [fol. 19] equipment at its main office and plant in Newark, New Jersey.

All manufacturing by the company is done at its plant in Newark, New Jersey. All sales are made at the main office located at the plant. Any use by this company is merely incidental to manufacture and takes place at the manufacturing plant.

All manufacturing records, engineering records, sales records, and all other records of the company are located in fire-proof vaults at the main office in Newark, New Jersey.

Although the company is licensed to do business in Illinois, it has no regular and established place of business there and, as previously stated, it has not performed any of the alleged infringing acts there. Its only activities in Illinois consist of maintaining a small stock of high-pressure apparatus (not low-pressure apparatus) and two sales representatives to solicit orders. These representatives are not agents of the company and have no authority to bind the company. All orders taken through such representatives are transmitted to the main office in Newark for confirmation and no sales are made without such confirmation.

The company would welcome an early adjudication of the charged infringement. However, to litigate said question in Chicago where it has no place of business, no records and no alleged infringing apparatus and has committed no alleged acts of infringement, instead of in New Jersey where its main office and plant and personnel and records are located, is regarded as an unwarranted burden.

[fol. 20] I am advised that, inasmuch as the company has a regular and established place of business in Newark, New Jersey and has there manufactured and sold the equipment complained of, the present action could have been brought in the District of New Jersey.

(Signed) Scott E. Allen.

Sworn to before me this 23rd day of July, 1951.
(Signed) Madeline R. McHugh.

[fol. 21] Certificate of Notary as to Date of Execution of Affidavit of Ralph F. Batch in Support of Motion to Dismiss

I hereby certify that the affidavit of Ralph F. Batch was executed on July 9, 1951 and that the date of June 9, 1951 appearing on the affidavit is erroneous.

(Signed) Elizabeth Gould, Notary Public. (Seal.)

Dated: July 27, 1951.

[fol. 22] EXHIBIT "C" TO PETITION

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Monday, October 15, 1951.

Present: Honorable John P. Barnes, District Judge.

No. 51 C 1007

CARDOX CORPORATION

vs.

C-O-TWO EQUIPMENT COMPANY

The Court being fully advised in the premises it is

Ordered that the motion of the defendant to dismiss, or, in the alternative, to transfer this cause be and it is hereby denied and it is

Further ordered that the defendant be and is hereby given thirty days within which to file answer hereia.

[fols. 23-25] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois do hereby certify the above and foregoing to be a true and correct copy of an original order made and entered in said Court on the 15th day of October, 1951, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of October, 1951.

Roy H. Johnson, Clerk, by E. B. Davis, Deputy Clerk.

[fols. 26-27] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

ANSWER—Filed November 15, 1951

Comes now the respondent, John P. Barnes, who, having been ruled to file in this court an original and four copies of his answer to the petition for a writ of mandamus within thirty days from the date of the rendition of said rule, prays that this paper writing may be taken and regarded as such answer.

The respondent says that he has no interest in this cause or in the issues thereof, other than such interest as any other citizen of the United States should have; that said limited interest does not, in respondent's opinion, warrant his becoming an actor in this cause, or warrant (1) his taking the time from his official duties to prepare and present an answer other than this or (2) his engaging and paying counsel to represent him in the preparation and presentation of such answer or (3) his becoming obligated to counsel who would doubtless represent respondent without expectation of remuneration by him.

John P. Barnes, Respondent.

November 14, 1951.

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

PETITION FOR LEAVE TO INTERVENE—Filed November 27, 1951

Now comes Cardox Corporation, a corporation of Illinois, and shows the Court:

1. That a petition was filed herein on October 29, 1951 for a writ of mandamus directing the Honorable John P. Barnes, Chief Judge of the United States District Court for The Northern District of Illinois, to nullify, vacate and set aside an order entered by him on the 15th day of October, 1951, in a case entitled Cardox Corporation vs. C-O-Two Fire Equipment Company, Civil Action No. 51 C 1007, denying a motion of petitioner for an order dismissing said action for improper venue.

2. Cardox Corporation is plaintiff in the said case entitled Cardox Corporation vs. C-O-Two Fire Equipment Company, Civil Action No. 51 C 1007.

3. On October 29, 1951, this Court entered an order to show cause which, *inter alia*, ordered that all proceedings in the District Court be stayed until final determination of said petition.

4. On November 14, 1951, the said Honorable John P. Barnes, respondent, filed his answer herein disclaiming interest in this cause, or the issues thereof, other than such interest as any other citizen of the United States should have.

[fols. 29-30] 5. That any decision rendered on said petition for mandamus will have material effect upon the interest of said Cardox Corporation.

Wherefore, Cardox Corporation prays the Court that it be allowed to intervene herein in opposition to the petition

for writ of mandamus, to file a pleading in opposition to the petition for writ of mandamus within ten (10) days of the date of entry hereof, and to file a brief and participate in oral argument herein.

Cardox Corporation, By its Attorneys, Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

Dated: November 26, 1951.

[fols. 31-32] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—November 27, 1951

Cardox Corporation having petitioned for leave to intervene herein, it is ordered:

1. That leave is hereby given to Cardox Corporation to intervene herein in opposition to the petition for writ of mandamus.

2. That Cardox Corporation may file a pleading in opposition to the petition for writ of mandamus within ten (10) days from the date hereof.

3. That Cardox Corporation may file a brief in support of its pleading within thirty (30) days from the date hereof.

4. That Petitioner may file a brief in reply thereof within fifteen (15) days thereafter and that the brief heretofore filed by Petitioner shall be considered its brief on the merits.

5. That Cardox Corporation may participate in oral arguments herein.

[fol. 33] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

INTERVENER'S ANSWER TO PETITION FOR WRIT OF MANDAMUS—Filed December 7, 1951

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Intervener, Cardox Corporation, in accordance with leave granted to it to intervene and to file a pleading in opposition to the Petition for Writ of Mandamus, files this, its answer to said petition.

1. Intervener admits that on June 26, 1951 it sued Petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, for patent infringement, in the action pending therein entitled *Cardox Corporation v. C-O-Two Fire Equipment Company*, Civil Action No. 51 C 1007; and further admits that Petitioner's Exhibit A is a true and authentic copy of the complaint in that action.

2. Intervener admits that there was no allegation in said complaint that Defendant (Petitioner herein) had committed any acts of infringement within the Northern District of Illinois.

3. Intervener admits that Defendant (Petitioner herein) filed a motion on July 12, 1951, asking that the complaint be [fol. 34] dismissed for improper venue and that Petitioner's Exhibit B is a true and authentic copy of the motion and supporting affidavits.

4. Intervener admits that the grounds of said motion were that Sec. 1400(b) of Title 28, U. S. Code had not been complied with but denies that such was the case and alleges that

that section had been fully complied with in that the venue was grounded upon the fact that Defendant (Petitioner herein) resided and resides in the Northern District of Illinois as required by that section and that the term "resides" as used therein is defined in Sec. 1391(c) of Title 28, U. S. Code, which provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Intervener denies that Sec. 1400(b) of Title 28, U. S. Code, requires that a suit for patent infringement be brought in a judicial district where a defendant has a regular and established place of business and had committed acts of infringement or, in the alternative, that such suit be brought in the judicial district of a defendant's "incorporation" as alleged on page 2 of the Petition for Writ of Mandamus.

5. Intervener admits that affidavits of Scott E. Allen, president, and Ralph F. Batch, secretary, of the Defendant (Petitioner herein) were submitted in support of said motion and state the matters alleged in the paragraph beginning on the bottom of page 2 and continuing to page 3 of Petition for Writ of Mandamus, but deny the inferences sought to be created that Defendant's infringing activities are confined to the State of New Jersey.

[fol. 35] 6. Intervener admits that Defendant (Petitioner herein) also requested the District Court to transfer said action under the discretionary provision of Sec. 1406(a), Title 28, U. S. Code.

7. Intervener admits that memoranda were filed on behalf of the Plaintiff (Intervener herein) and Defendant (Petitioner herein) and that the motion came on for hearing before the Honorable John P. Barnes, (Respondent herein) on October 15, 1951. Intervener denies the inferences sought to be created by the statement on page 3 of the Petition for Writ of Mandamus that the Honorable John P. Barnes (Respondent herein) "declined to hear argument and decided the matter from the bench" but alleges the fact to be that prior to October 15, 1951, Petitioner filed a memoran-

dum of 16 pages and a reply memorandum of 9 pages and that Intervener filed a memorandum of 14 pages which were read and considered by the Respondent and that Petitioner upon oral argument presented no matter not covered in said memoranda; and Intervener further alleges that Respondent had previously considered briefs and arguments directed to the same point of law in another case.

8. Intervener admits that an order was entered denying the motion on the 15th day of October, 1951 and that Petitioner's Exhibit C is a true and authentic copy of said order.

9. Intervener denies that the District Court has retained jurisdiction over the action without authority in law as alleged in paragraph numbered 1 on page 4 of the Petition for Writ of Mandamus. Intervener denies the further statement of said paragraph that Petitioner has been deprived of any right given to it by Sec. 1400(b) of Title 28, U. S. Code, but alleges the fact to be that Petitioner was sued where it resided in accordance with said section, that that section had been fully complied with in that the venue was grounded [fol. 36] upon the fact that Defendant resided and resides in the Northern District of Illinois as required by that section and that the term "resides" as used therein is defined in Sec. 1391(c) which provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Intervener denies that Sec. 1400(b) of Title 28, U. S. Code, requires that a suit for patent infringement be brought in a judicial district where a defendant has a regular and established place of business and had committed acts of infringement, or in the alternative, that such suit be brought in the district of a defendant's "incorporation", as alleged in page 2 in the Petition for Writ of Mandamus.

10. Intervener denies that Petitioner has been injured by the action of the District Court in denying its motion to dismiss the complaint for improper venue, or to transfer the case, and alleges that said motion was denied under authority of law in that Petitioner was sued for patent in-

fringement in the Northern District of Illinois wherein it resides, in accordance with the provisions of Sec. 1400(b), Title 28, U. S. Code.

11. Intervener incorporates herein by reference paragraph numbered 10 above in answer to paragraph numbered 3 on page 4 of the Petition for Writ of Mandamus and further, denies that Sec. 1400(b), Title 28, U. S. Code, requires that patent infringement actions be brought in the judicial district wherein a defendant has committed acts of infringement and has a regular and established place of business, or in the alternative, that such actions be brought in the judicial district wherein a defendant is "incorporated", but alleges the fact to be that that [fols. 37-39] section provides that an action for patent infringement may be brought in a "judicial district where the defendant resides." Intervener further denies the inferences sought to be created that Defendant's business and infringing acts are confined solely to the state of New Jersey and further denies that Defendant (Petitioner herein) has made any showing of "inconvenience and annoyance" which would result from its defending the present action for patent infringement above referred to in the United States District Court for the Northern District of Illinois, Eastern Division, and further denies that such showing, had it been made, would be sufficient ground for either dismissal of said action or transfer to another judicial district.

Wherefore, Intervener prays:

A. That the Petition for Writ of Mandamus be denied;

B. That the Order to Show Cause directed to Respondent, the Honorable John P. Barnes, Chief Judge of the United States District Court for the Northern District of Illinois, be quashed; and

C. That Respondent and Intervener have costs in this action, including reasonable attorneys' fees, and such other and further relief as may be deemed to be proper and just.

Respectfully submitted, Cardox Corporation, By Its Attorneys, Andrew J. Dallstream, Fredric H. Stafford, 231 S. LaSalle St., Chicago; George I. Haight, John W. Hofeldt, 209 South LaSalle St., Chicago.

Dated: December 7, 1951.

[fols. 40-41] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ARGUMENT AND SUBMISSION—January 18, 1952

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Mr. R. Morton Adams, counsel for petitioner, and Mr. George I. Haight, counsel for intervenor and respondent, and the Court takes this matter under advisement.

[fol. 42] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1951, JANUARY SESSION, 1952

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

Petition for Writ of Mandamus

OPINION—February 1, 1952

Before Major, Chief Judge, Lindley and Swaim, Circuit Judges

MAJOR, Chief Judge:

The question for decision is whether the definition of corporate "residence" for venue purposes contained in Title 28 U. S. C. A. Sec. 1391 (c) applies to Sec. 1400 (b) of the same Title, relating to venue in actions for patent infringement.

On June 26, 1951, Cardox Corporation, an Illinois corporation, instituted in the Northern District of Illinois, East-

ern Division, its action against C-O-Two Fire Equipment Company, as defendant, charging patent infringement. The complaint alleged that the action arose under the patent [fol. 42a] laws of the United States, and venue was predicated upon the allegation, "defendant * * * is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois." It will be noted that there was no allegation that "the defendant has committed acts of infringement" in the District where the suit was instituted. Predicated upon this ground the defendant, on July 12, 1951, filed its motion for a dismissal of the action because of a failure to allege proper venue. Defendant also suggested to the court that instead of dismissing the action it would be appropriate to transfer it, under the discretionary provision of Sec. 1406 (a) of Title 28 U. S. C. A.

The defendant in support of its motion submitted affidavits of its president and secretary, admitting that defendant was licensed to do business and had a place of business within the Northern District of Illinois but stating that such business as was transacted there was not related to the alleged infringing acts and that defendant had committed no alleged infringing acts within the Northern District of Illinois, and admitting that it had committed acts of the kind complained of in the State of New Jersey, where the defendant maintained its principal office and manufacturing plant, kept all of its books and records relating to the alleged infringing activities and where its officers, engineers and employees who were acquainted with the alleged infringing activities were located.

On October 15, 1951, the District Court, Honorable John P. Barnes presiding, respondent herein, entered an order denying defendant's motion to dismiss or in the alternative to transfer the cause, and ordered the defendant to answer the complaint within thirty days.

On October 29, 1951, the defendant (hereinafter referred to as the petitioner) filed in this court its petition for a writ

of mandamus to the Honorable John P. Barnes, directing that he vacate and set aside the order entered October 15, [fol. 42b] 1951, denying the motion to dismiss or in the alternative to transfer the case. To this petition an answer was filed by respondent on November 14, 1951, disclaiming interest in the cause or the issues thereof other than such interest as any other citizen of the United States should have. On November 27, 1951, Cardox Corporation, plaintiff in the suit below, was, upon its petition, given leave to intervene in this court and to contest the issuance of the writ sought by petitioner. (Cardox Corporation will be hereinafter referred to as the intervenor.)

In the beginning, we conclude that this court has the power to issue the writ of mandamus and, if petitioner is correct in its position, that it is an appropriate case for the exercise of such power. *Ford Motor Co. et al.* v. *Ryan*, 182 F. 2d 329, 330; *Paramount Pictures, Inc. et al.* v. *Rodney*, 186 F. 2d 111, 116. *Cf. Ex Parte Collett*, 337 U. S. 55. We need not labor this point, however, because intervenor in its brief raises no question in this respect and in oral argument conceded both the power of the court and the appropriateness of the remedy.

The question for decision stated in the beginning, in reality, simmers down to the inquiry as to whether venue in a patent infringement suit can properly be laid in a District other than that of its incorporation, even though it has a regular and established place of business in such District, in the absence of an allegation that it has committed acts of infringement therein.

Petitioner in support of its position contends that Sec. 1391 (c), a general venue provision, has no application to Sec. 1400 (b), a special venue provision relating solely to actions for patent infringement. Petitioner cites numerous court decisions which assertedly support its position and places much reliance upon the legislative history, including the Reviser's Notes, as demonstrating a clear intention on the part of Congress to make no change in the law of venue in suits for patent infringement as it existed prior to the revision of the Judicial Code.

The intervenor contends that Secs. 1400 (b) and 1391 (c) are complementary and that the definition of "residence"

[fol. 42c] contained in the latter section must be given effect and applied to the former. Intervenor likewise cites court decisions asserted to support its contention. It, however, attaches little if any weight to the legislative history or the Reviser's Notes which accompany the two sections, on the premise that the phraseology found in the two sections, and particularly Sec. 1391 (c), is so clear and unambiguous as not to permit of any interpretation or construction. Intervenor's argument goes to the extent of asserting that the adoption of petitioner's position would require judicial legislation by adding at the end of Sec. 1391 (c) the phrase, "except in patent litigation."

Much is said by the parties in their briefs relative to the interpretation or construction which should be given to the two sections in controversy but, in our view, it is more accurate to state that the issue depends upon whether the two sections must be read together or, more pointedly, whether Sec. 1391 (c) is applicable to Sec. 1400 (b). The numerous sections of Chapter 87 of the Judicial Code prescribe the venue of District Courts under a variety of circumstances. Sec. 1391 (c), entitled "Venue generally," provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Sec. 1400 (b), entitled "Patents and copyrights," provides:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Thus, the former section is general and applies only to a corporation, while the latter is special, relating to a specific subject matter and evidently is applicable to individuals as well as corporations. We agree with the inter- [fol. 42d] venor's contention that the phraseology of Sec. 1391 (c) is clear, plain and unambiguous and is not sus-

No. 25

No. 25

NOTE SUBMITTED BY RESPONDENT AT ARGUMENT

§1695 - Stockholder's derivative action

"Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business."

REVISER'S NOTE

"Based on title 28, U.S.C., 1940 ed., § 112 (Mar. 3, 1911, ch. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

"The phrase 'is organized or licensed to do business or is doing business' was substituted for the words 'resides or is found,' as more specific and to conform to section 1391 of this title.

"Venue provisions of section 112 of title 28, U.S.C., 1940 ed., appear in section 1391 and 1401 of this title. Other provisions are incorporated in section 1693 of this title.

"Changes were made in phraseology."

The corresponding portion of prior §112 read as follows:

> ". . . except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found. . ."

ceptible to interpretation or construction. But even so, the point is immaterial. The question is whether Sec. 1391 (c) has any application to Sec. 1400 (b), or more pointedly, whether the latter section is dependent for its force and vitality upon the former. And the acceptance of petitioner's contention requires no interpretation or construction of Sec. 1391 (c) other than that it be held inapplicable to an action for patent infringement. Sec. 1391 (c) would remain just as it is written, to be given application in an appropriate situation.

On the other hand, intervenor's contention, if accepted, would result in partial if not complete emasculation of Sec. 1400 (b) as it relates to a corporate defendant in actions for patent infringement. This incongruous result is highlighted by a recasting of the section so that it will read in accordance with such contention. The following is the result (the italized words we insert):

> "Any civil action *against a corporation* for patent infringement may be brought in the judicial district where the defendant resides, *to wit, in the judicial district in which it is incorporated or licensed to do business or is doing business*, or where the defendant has committed acts of infringement and has a regular and established place of business."

The two alternatives for venue in Sec. 1400 (b) stem from old Sec. 109 (Judicial Code Sec. 48), with only slight changes in phraseology. As to this predecessor provision, it has been held that it conferred upon defendants in patent cases a privilege in respect to the places in which suits could be maintained against them. *General Electric Co. et al.* v. *Marvel Rare Metals Co. et al.*, 287 U. S. 430, 435. See also *Stonite Products Co.* v. *Melvin Lloyd Co. et al.*, 315 U. S. 561. No purpose is discernible on the part of Congress, in its revision, to eliminate or minimize this privilege or the protection which it afforded. And certainly if there had been such a purpose, Congress would not have [fol. 42e] attempted to accomplish it in such an awkward and indirect fashion.

A reading of the provision recast conformable to inter-

venor's contention makes it apparent, so we think, that the first alternative as a venue limitation becomes abortive and the second meaningless if not inconsistent. What purpose could be served in limiting venue to the District where the defendant resides if that includes not only the District of its incorporation but also a District either in which it is licensed to do business or is doing business? And if a corporation can be sued where it "is doing business," what possible purpose can be served by the second venue alternative, "where the defendant has committed acts of infringement and has a regular and established place of business"? Intervenor's contention would permit a suit to be brought in the District where the defendant "is doing business" but not in the District where it has a "regular and established place of business" in the absence of a showing that the defendant "has committed acts of infringement" in such District. Such an anomalous theory, if embraced, would make a dead letter out of the second alternative in the patent venue section. The plaintiff in determining proper venue for his suit against a corporation for patent infringement would hardly need to read Sec. 1400 (b). Why bother with an allegation that the "defendant has committed acts of infringement and has a regular and established place of business" in the District, which it later would be required to prove, when an allegation that the defendant is "doing business" in the District would suffice? And it would be futile for the defendant to rely upon the special venue provision in a patent infringement suit because the privilege or protection which that section was designed to afford would no longer exist. In fact, it appears to us that the theory which intervenor would have us embrace would make the patent venue section more inclusive than the general corporate venue section.

In the Stonite case (315 U. S. 561), the court held that a general venue statute must give way to Sec. 48, the special statute relating to venue in patent infringement suits. The court reasoned that the special statute was not affected by [fol. 42f] general provisions, that the former was adopted "to define the exact jurisdiction of the federal courts in actions to enforce patent rights," and that such purpose indicated that Congress did not intend "to dovetail with the

general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings." True, this decision was prior to the adoption of the present Code and is, therefore, not decisive of the instant question, but the rationale which the court employed is, in our opinion, pertinent to the present situation. Especially is this so when no purpose to change the existing law is evidenced by a reading of the two sections under consideration or by the Reviser's Notes shown in connection therewith. And it doesn't seem likely that Congress would have made such an important departure from the law as it then existed relative to venue in patent infringement cases without so stating.

Intervenor's argument that the residence of a corporation was not defined in Sec. 1400 (b) and that resort must, therefore, be had to Sec. 1391 (c) at least has the virtue of some plausibility; however, we think the argument must be rejected on the basis that the latter section is without application. Moreover, as heretofore stated, the Reviser's Notes unmistakably disclose that the only change made in the patent venue section as it then existed was one of phraseology and not of substance. In fact, the only change made pertinent to the question under discussion, as stated in the Reviser's Notes (following Sec. 1400), is as follows:

> "Words in subsection (b) 'where the defendant resides' were substituted for 'of which the defendant is an inhabitant.' A corresponding change was made in subsection (a). Words 'inhabitant' and 'resident,' as respects venue, are synonymous.

We think there is disclosed an unmistakable intention as well as purpose neither to enlarge nor diminish the venue in patent infringement suits but to leave it as it then existed, and that means, of course, that under the first alternative of the section a defendant corporation can be sued only in the place of its incorporation.

[fol. 42g] Intervenor places much stress upon *Ex Parte Collett*, 337 U. S. 55, and asserts that practically every argument advanced by the petitioner here was made by the petitioner in that case and rejected by the Supreme Court. We are of the view that the reasoning of the Collett case is

inapplicable here, and in any event not controlling. There, the court held that Sec. 1404(a), relating to the right to transfer, was applicable to Sec. 6 of the Federal Employers' Liability Act, which determined venue in actions thereunder. Relative thereto, the court stated (page 60):

> "Section 6 of the Liability Act defines the proper forum; §1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously."

We think it apparent that the situation before the court in that case was quite different from that of the instant case. There, the court was dealing with two sections, one which bestowed venue and the other which provided for transfer when venue was properly laid, and the latter did not "limit or otherwise modify any right granted in" the former. Thus the court gave effect to both provisions because they were not inconsistent and neither provision abridged any right contained in the other. In contrast, the two sections in the instant matter both relate to venue and they cannot be applied, as intervenor would have us do, without making one section dependent upon the other and, as already shown, this would result for all practical purposes in the emasculation of Sec. 1400 (b).

The instant question has been before the District Courts in a number of cases, some precisely in point and others persuasive because of their close analogy. The weight of such decisions militates strongly against the intervenor's position. One of the best reasoned opinions is that of Dis-[fol. 42h] trict Judge Harrison in *Gulf Research & Development Co. et al.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 17. Among other things he stated (page 19), "The Reviser's Notes make it evident that today, 1400 (b) stands in the same situation as did Section 109 at the time of the Stonite opinion in 1942 and that the Stonite case is just as much in point now as then," and "I hold that Section 1391

(c) is not complementary to Section 1400 (b); that the word 'resides' in Section 1400 (b) means the same as the word 'inhabitant' in the former Section 109, and that the interpretation placed upon said former Section 109 applies to its revision as set forth in the revised Section 1400 (b)." This opinion is also interesting from the fact that Judge Harrison reached a result opposite to that reached by two of his associates on the same court. *Farr Co.* v. *Gratiot et al.*, 92 F. Supp. 320, and *Radio Corp. of America* v. *Paramount Pictures, Inc.* (P. C. S. D. Cal. 1950), an unreported decision. The opinion in the Farr case was written by District Judge Hall. The opinions in these two cases, that is, in Gulf and Farr, written by Judges in the same District, contain about all that can be said on the opposing sides of the controversy. We think Judge Harrison reached the right result.

In *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, the court held that Sec. 1400 (b) was not enlarged by Sec. 1391 (c) and that to do so would completely nullify "the specific venue statute relative to patent infringement suits."

In *Fischer* v. *Karl et al.*, 84 F. Supp. 53, 55, the court stated:

> "In a word, to grant this motion would be to render 28 U. S. C. A. §1400 (b) completely meaningless. If Congress intended that the venue provisions of 28 U. S. C. A. §1392 (a) here invoked were applicable to patent suits, it is impossible to conceive why it was found necessary to enact new 28 U. S. C. A. §1400 (b), which, at least in the case at bar, is a limitation of venue specifically applicable to the cause."

[fol. 42i] We cite without further comment the other cases which support in one form or another petitioner's position. *Ackerman* v. *Hook et al.*, 183 F. 2d 11; *Arkay Infants Wear, Inc.* v. *Kline's, Inc. et al.*, 85 F. Supp. 98; *Rava* v. *Westinghouse Electric Corp.*, 90 F. Supp. 707; *Curtis et al.* v. *Madovoy et al.*, 84 F. Supp. 637; *Aetna Ball & Roller Bearing Co.* v. *The Federal Bearing Co., Inc.*, decided by Judge Igoe in the Northern District of Illinois (not reported).

Holding as we do that venue was improperly laid, the

relief sought by the petitioner must be granted. Title 28 U. S. C. A. Sec. 1406 (a) undoubtedly is applicable to the situation. It provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Thus, two alternatives are provided, (1) a dismissal of the case or (2) if it be in the interest of justice, a transfer to the appropriate District. Respondent, therefore, is directed to give effect to one or the other of such alternatives, without prejudice to his right to decide which it shall be.

LINDLEY, C. J. dissenting:

The problem here seems to me a simple one. Sec. 1400 (b) of Title 28 U. S. C. provides, in its very first clause, that an action "for patent infringement may be brought in the judicial district where the defendant resides." Sec. 1391 (c) of Title 28 U. S. C. prescribes that the district in which a corporation is incorporated or licensed to do business or is doing business "shall be regarded as the residence of such corporation for venue purposes." The intervenor, plaintiff below, averred in its complaint that defendant, petitioner here, is a corporation licensed to do business in Illinois and is doing business within the Northern District of Ilinois, thus bringing defendant within the class of corporate defendants whose residence is, by virtue of Sec. 1391 (c), within the Northern District of Illinois. It seems to me that the District Court could not have done [fols. 42j-43] other than it did without doing violence to the clear provisions of the two sections. Inasmuch as defendant is a resident of the Northern District of Illinois, by virtue of the express provisions of Sec. 1391 (c), plaintiff had a right, under Sec. 1400 (b), to bring the suit in that District. To hold otherwise seems to me to require that we interpolate at the end of Sec. 1391 (c) the phrase "except in patent infringement cases." To do so is beyond our function. I would deny the petition.

[fols. 44-45] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent,

CARDOX CORPORATION, Intervenor

JUDGMENT GIVING RESPONDENT TWO ALTERNATIVES—February 1, 1952

This matter came on to be heard before the Court on an original Petition for Writ of Mandamus, the answer of Respondent thereto, and the Intervenor's answer thereto.

On consideration whereof, it is ordered and adjudged by this Court that Respondent be directed to give effect to one or the other of the following alternatives, (1) a dismissal of the case or (2) if it be in the interest of justice, a transfer to the appropriate District.

[fols. 46-48] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

PETITION TO STAY THE MANDATE—Filed February 11, 1952

To the Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes Cardox Corporation, Intervener in the above entitled cause, by its attorneys, and moves this Court to stay issuance of the mandate herein pending the outcome of a petition for the writ of certiorari to be filed by Intervener to the Supreme Court of the United States.

Respectfully submitted, Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

[fols. 49-50] UNITED STATES COURT OF APPEALS FOR TH
SEVENTH CIRCUIT

[Title omitted]

ORDER STAYING MANDATE—February 12, 1952

On motion of counsel for Cardox Corporation, Interveno
in this cause, it is ordered that the issuance of the mandat
of this Court in this cause be, and the same is hereby, staye
for a period of thirty days pursuant to the provisions o
Rule 25 of the Rules of this Court.

[fol. 51] IN THE UNITED STATES COURT OF APPEALS FOR TH
SEVENTH CIRCUIT

[Title omitted]

DESIGNATION FOR THE UNITED STATES SUPREME COURT
RECORD—Filed February 14, 1952

To Kenneth J. Carrick, Clerk, United States Court of Ap
peals for the Seventh Circuit, 1212 Lake Shore Driv
Chicago, Illinois:

Please prepare a record for use in connection with a Pet
tion for the Writ of Certiorari in the Supreme Court of th
United States and include therein the following:

1. Application for leave to file Petition for the Writ o
Mandamus.

2. Order granting leave to file Petition for the Writ o
Mandamus.

3. Petition for the Writ of Mandamus.

4. Order to show cause returnable in thirty days and stay
ing proceedings.

5. Respondent's answer to Petition for the Writ o
Mandamus.

6. Petition of Cardox Corporation for leave to inte
vene.

7. Order granting leave to Cardox Corporation to inte
vene, etc.

[fols. 52-53] 8. Intervener's answer to Petition for the Writ of Mandamus.

9. Order taking cause under advisement.

10. Opinion by Chief Judge Major and dissenting opinion of Circuit Judge Lindley.

11. Judgment giving Respondent two alternatives.

12. Petition for stay of mandate and order staying same.

Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

[fol. 54] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO 10, ILLINOIS

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 25

CARDOX CORPORATION, Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY

ORDER ALLOWING CERTIORARI—Filed April 21, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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Office - Supreme Court, U.
FILED
MAR 12 1952
CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. [redacted] 25

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE I. HAIGHT
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209 South LaSalle Street
Chicago 4, Illinois
ANDREW J. DALLSTREAM
FREDRIC H. STAFFORD
231 South LaSalle Street
Chicago 4, Illinois
Counsel for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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Mincy v. Detroit and Cleveland Navigation Co., 94 F. Supp. 456, (D.C. S.D. N.Y., 1950) 8

Nachtman v. Jones and Laughlin Steel Corp., 90 F. Supp. 739 (D.C. D. of C., 1950) 7

Radio Corporation of America v. Paramount Pictures, Inc., et al., (D.C. S.D. Cal., 1950), Civil Action No. 8070-WM, unreported 6, 7

Sponge Products v. Fuller Brush Co., (D.C. N.D. Ill. 1951), Civil Action No. 51 C. 382, unreported 6, 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No.

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Cardox Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 1, 1952, granting a Petition for the Writ of Mandamus in the case of *C-O-Two Fire Equipment Company* v. *John P. Barnes, Judge of the United States District Court for the Northern District of Illinois,* No. 10512, in which case this Petitioner was permitted to and did intervene. The judgment of the United States Court of Appeals for the Seventh Circuit directed

Judge Barnes to vacate and set aside an order entered by him on October 15, 1951 in an action entitled *Cardox Corporation* v. *C-O-Two Fire Equipment Company,* Civil Action No. 51-C-1007. That order denied a motion of Respondent, Defendant in that Court, to dismiss, or in the alternative, to transfer the cause, and ordered Defendant to answer the Complaint within thirty days.

Summary and Statement of the Matter Involved.

On June 26, 1951, Petitioner filed, in the United States District Court for the Northern District of Illinois, a Complaint charging Respondent with patent infringement (R. 7). Venue was predicated upon the allegation that the defendant corporation was licensed to do business in the State of Illinois and therefore was a resident thereof (R. 7). On July 12, 1951, Respondent moved to dismiss, or in the alternative to transfer the action (R. 9). The ground for this motion was that the defendant corporation was not incorporated in the State of Illinois and the Complaint contained no allegation that the Defendant had committed acts of infringement within the Northern District of Illinois, that therefore there was no proper venue. On October 15, 1951 Judge Barnes denied Respondent's motion and ordered that an answer be filed (R. 13). The basis for Judge Barnes' decision was that under the Judicial Code as revised and effective September 1, 1948, the grounds for venue in a patent infringement action included that of residence (Title 28 U.S.C., Section 1400(b)) and that as concerns a corporate defendant, Congress had defined residence as including any judicial district within which a corporate defendant was licensed to do business (Title 28 U.S.C., Section 1391(c)).

On October 29, 1951, a Petition for the Writ of Mandamus was filed by Respondent in the United States Court of Appeals for the Seventh Circuit, directing Judge Barnes to nullify, vacate, and set aside the order denying Respondent's motion and further directing Judge Barnes to grant the relief asked for in Respondent's motion (R. 2). Judge Barnes filed his answer thereto on November 14, 1951 (R. 14), disclaiming interest in the case or the issues thereof, other than such interest as any other citizen of the United States should have. Whereupon, on November 27, 1951, Petitioner (Intervener below) petitioned for leave to intervene, to file a pleading in opposition to the Petition, to file a brief, and to participate in oral argument (R. 15). The Court of Appeals granted such leave (R. 16) and Petitioner's answer to the Petition for the Writ of Mandamus was filed on December 7, 1951 (R. 17).

The Court of Appeals, on February 1, 1952, directed Judge Barnes either to dismiss the case or transfer to an appropriate district if it were in the interest of justice to do so, pursuant to Title 28, U.S.C., Section 1406(a), (R. 31). The majority opinion of the Court of Appeals held that under Title 28, U.S.C. Section 1400(b) a corporate defendant must be sued for patent infringement either in the district wherein it is incorporated or in the judicial district where it has a regular and established place of business and has committed acts of infringement (R. 21). Judge Lindley dissented upon the ground that a patent infringement action may be brought in the judicial district where a defendant resides under Section 1400(b) of Title 28 U.S.C., and that Section 1391(c) of Title 28 U.S.C. defines the residence of a corporate defendant "for venue purposes" as including any judicial district wherein the corporate defendant is licensed to do business (R. 30).

Petitioner did not contest either the power of the Court of Appeals to issue the Writ of Mandamus or the appropriateness of such remedy, but disputed the position of Respondent on the venue question (R. 23). Petitioner adheres to this position. However, Petitioner notes that the United States Court of Appeals for the Third Circuit in *Gulf Research & Development Company, et al.* v. *Leahy, et al.*, 193 F. (2d) 302 (C.A. 3, 1951), held that mandamus was inappropriate to review, in advance of a trial on the merits, a ruling by a District Court on precisely the identical venue issue here involved. Some of the language in the opinion cited could be construed as denying the existence of the *power* to issue a writ of mandamus where the error complained of involves a definite want of statutory authority and not merely an abuse of discretion in balancing the conveniences involved.

Opinions Below.

The order of the District Court denying Respondent's motion to dismiss the cause or in the alternative to transfer (R. 13), issued without opinion and is unreported. The opinion of the Court of Appeals directing Judge Barnes to either dismiss the case or to transfer the case to the appropriate district, if it were in the interest of justice so to do (R. 21), is reported in ..... F. (2d) ..... (C.A. 7, 1952).

Jurisdiction.

The judgment of the Court of Appeals was entered on February 1, 1952 (R. 31). The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

Question Presented.

Congress having provided that venue in a patent infringement action includes "the Judicial District where the defendant resides" (Title 28 U.S.C., Section 1400(b)), and having provided that any judicial district in which a corporation is "licensed to do business • • • shall be regarded as the residence of such corporation for venue purposes" (Title 28 U.S.C., Section 1391(c)), is venue in a patent infringement action properly laid in a judicial district in which the defendant corporation is licensed to do business?

Statutes Involved.

Title 28 U.S.C., Section 1400. Patents and copyrights.

• • •

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

• • •

Title 28 U.S.C., Section 1391. Venue generally.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Reasons for Granting the Writ.

1. The question presented is an important question of Federal Law which has not been, but which should be settled by the Supreme Court.

The question of proper venue in patent infringement actions against corporate defendants is a matter of great importance to orderly judicial procedure.

Whether the phrase "for venue purposes" in the Congressional definition of corporate residence enacted as Title 28 U.S.C., Section 1391(c), includes patent infringement actions is a question of obvious importance to Federal District Courts. Its answer decides the power of such Courts to proceed in many cases in this important branch of Federal Law.

The necessity for an early decision on this question by this Court is shown by the confusion in the District Courts which has existed since the revision and amendment of the Judicial Code, effective September 1, 1948. So far as Petitioner's research has revealed, in addition to the proceedings by Judge Barnes in the instant case, three courts have decided the question in the affirmative. The cases so holding are: *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al,* (D.C. S.D. Cal., 1950), Civil Action No. 8070-WM, unreported; *Farr* v. *Gratiot, et al,* 92 F. Supp. 320, (D.C. S.D. Cal., 1950); and, *Sponge Products* v. *Fuller Brush Company,* (D.C. N.D. Ill., 1951), Civil Action No. 51 C 382, unreported.

In four other cases District Courts have decided that in spite of the unambiguous language of the statutes involved, a corporate defendant in a patent infringement action may be sued only in the district of its incorporation or in a district where it has a regular and established place of business and has committed acts of infringement. They are: *Gulf Research and Development Company, et al,* v. *Schlumberger Well Surveying Corporation,* 92 F. Supp. 16, (D.C. S.D. Cal., 1950); *Aetna Ball and Roller Bearing Company* v. *The Federal Bearing Company, Incorporated,*

(D.C. N.D. Ill., 1950), Civil Action No. 50 C 857, unreported; *Nachtman* v. *Jones and Laughlin Steel Corporation,* 90 F. Supp. 739, (D.C. D. of C., 1950); and, *Dalton* v. *Shakespeare Company,* (D.C. S.D. Fla., 1951), Case No. 1884 —Civil Tampa, unreported. Petitioners are advised that in the *Dalton* v. *Shakespeare* case, an appeal has been taken to the Court of Appeals for the Fifth Circuit and is currently pending therein.

Further, in the instant case the District Court had decided that a corporation could be sued for patent infringement in a district where it was licensed to do business. Although the Court of Appeals held that it could not be sued in such district, that Court itself was divided on the question with Judge Lindley dissenting upon the ground that the District Court could not have dismissed the action without "doing violence to the clear provisions of the two sections" (R. 30).

The importance of the question presented is further emphasized when it is considered that the definition of corporate residence found in Title 28 U.S.C., Section 1391(c) must, of necessity, have application to special venue statutes other than that relating to the patent infringement actions. Confusion in the lower courts will be multiplied until this Court determines whether or not the language of Section 1391(c) means what it says, namely, that it defines residence "for venue purposes".

2. The decision of the Court of Appeals conflicts with decisions of other Federal Courts.

The identical issue here before the Court and before the Court of Appeals was decided in *Farr* v. *Gratiot, et al,* 92 F. Supp. 320, (D.C. S.D. Cal., 1950) and *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al,* (D.C. S.D. Cal., 1950), Civil Action 8070-WM, un-

reported, and *Sponge Products* v. *Fuller Brush Company,* (D.C. N.D. Ill., 1951), Civil Action 51 C 382, unreported. The Court of Appeals reached the opposite result from that of those Courts.

The Court of Appeals below not only reached a conclusion opposite to that of the Court in the *Farr* case on the venue issue, but in so doing applied a rule of statutory construction in conflict with the rule applied by the Court in the *Farr* case. The Court in the *Farr* case stated (92 F. Supp. 320):

> "* * * Furthermore, I cannot agree that the reviser's notes as to any particular section should control over the text of the Code, where there is no ambiguity in the text."

Moreover, on both the issue of venue in patent infringement suits and on the issue of statutory construction, the Court of Appeals itself was divided.

In addition to the conflict in the lower courts on the question of venue as to corporate defendants in patent infringement actions, conflict exists between those cases and cases deciding the applicability of the definition to other special venue statutes.

In *Bagner* v. *Blidberg Rothchild Company,* 84 F. Supp. 973, (D.C. E.D. Pa., 1949), *Bounds* v. *Streckfus Steamers,* 89 F. Supp. 242, (D.C. Del., 1950) and *Mincy* v. *Detroit and Cleveland Navigation Company,* 94 F. Supp. 456, (D.C. S.D. N.Y., 1950) the Courts held that the definition applied to actions brought under Title 46 U.S.C., Section 688 (the Jones act) and in *Lipp et al,* v. *National Screen Service Corporation,* 95 F. Supp. 66, (D.C. E.D. Pa., 1950) the Court held the definition to apply to actions under Title 15 U.S.C., Section 22 (the Clayton Act).

The uncertainty facing litigants and courts alike in patent infringement actions is emphasized by the fact that in the Southern District of California the judges themselves are in disagreement, and whether proper venue exists depends upon the view of the particular judge trying the case.

Petitioners have been unable to find any decision by this Court dealing either with the question as applied to patent infringement actions or the broader question of whether the definition applies to actions brought under other special venue statutes.

3. The decision of the Court of Appeals conflicts with applicable decisions of this Court concerning the proper rules for statutory construction.

In *Ex Parte Collett*, 337 U.S. 55 (1949) this Court decided a question arising under the venue statutes of the revised Judicial Code. The question there presented is remarkably similar to the question in the instant case. There, this Court was confronted with the issue of whether the doctrine of *forum non conveniens*, enacted as Section 1404(a) of Title 28 U.S.C., was applicable to cases arising under the Federal Employers' Liability Act (Title 45 U.S.C., Sections 51-59). Prior to the revision of the Judicial Code, this Court had decided that the doctrine was not applicable to that type of case. However, under the revised Code this Court in construing the statutes involved stated at page 61:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

> ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

The doctrine of the *Collett* case was applied by this Court to similar facts involving the same issue in *Kilpatrick* v. *Texas and Pacific Railway Company*, 337 U.S. 75 (1949).

The identical rule of statutory construction was applied by this Court in *United States* v. *National City Lines, Incorporated*, 337 U.S. 78 (1949) wherein the question involved was whether the doctrine of *forum non conveniens* was applicable to actions arising under the anti-trust laws. This Court decided that the doctrine enacted as Section 1404(a) of Title 28 U.S.C. was applicable by reason of "the unequivocal words of Sec. 1404(a)" (337 U.S. 84).

The decision of the Court of Appeals in construing the venue sections involved is in direct conflict with the rules of statutory construction applied by this Court in the *Collett* case. The dissenting opinion of Judge Lindley is a correct statement of the applicable law as announced by this Court. The dissent states (R. 30):

> "The problem here seems to me a simple one. Sec. 1400(b) of Title 28 U.S.C. provides, in its very first clause, that an action 'for patent infringement may be brought in the judicial district where the defendant resides.' Sec. 1391(c) of Title 28 U.S.C. prescribes that the district in which a corporation is incorporated or licensed to do business or is doing business 'shall be regarded as the residence of such corporation for venue purposes.' The intervenor, plaintiff below, averred in its complaint that defendant, petitioner here, is a corporation licensed to do business in Illinois and is doing business within the Northern District of Illinois, thus bringing defendant within the class of corporate defendants whose resi-

dence is, by virtue of Sec. 1391(c), within the Northern District of Illinois. It seems to me that the District Court could not have done other than it did without doing violence to the clear provisions of the two sections. Inasmuch as defendant is a resident of the Northern District of Illinois, by virtue of the express provisions of Sec. 1391(c), plaintiff had a right, under Sec. 1400(b), to bring the suit in that District. To hold otherwise seems to me to require that we interpolate at the end of Sec. 1391(c) the phrase 'except in patent infringement cases.' To do so is beyond our function. I would deny the petition."

The majority opinion results in a judicial re-write of both sections 1391(c) and 1400(b) of Title 28 U.S.C. The effect of the majority opinion, as pointed out in the dissenting opinion (R. 30), is the addition to the end of Section 1391(c) of the phrase "except in patent infringement cases."

Section 1400(b) is in effect rewritten by the Court of Appeals to read:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant (if an individual) resides, (or, if a corporation, then in the judicial district where such defendant is incorporated), or where the defendant (either individual or corporate) has committed acts of infringement and has a regular and established place of business."

The conflicts in opinions as noted, not only on the issue of the applicability of the definition of corporate residence (Title 28 U.S.C., Section 1391(c)) to patent infringement actions (Title 28 U.S.C., Section 1400 (b)), but also on the proper rule of statutory construction, are conflicts on important issues which have not been but should be settled by this Court.

In the *Collett* case this Court assigned as its reason for hearing the case that the issue involved "seemed of importance in the administration of justice", and noted the conflict in the decisions of District Courts on the issue (337 U.S. 57). The issue in the instant case is of equal importance. Also, a conflict of decisions exists in the District Courts. Further, the majority opinion of the Court of Appeals below is in conflict with applicable decisions of this Court on the question of statutory construction.

CONCLUSION.

For the foregoing reasons this petition for the writ of certiorari should be granted.

Respectfully submitted

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FILED
MAR 10 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. [redacted] 25

CARDOX CORPORATION,

Petitioner,

v.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. .

CARDOX CORPORATION,

Petitioner,

v.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner asks this Court to review the decision of the Seventh Circuit Court of Appeals concerning the application of the venue provisions of the Judicial Code to patent cases—28 U. S. C., Secs. 1391(c) and 1400(b).

Petitioner, as justification for review, urges that the question of venue is an important one; that the Court of Appeals' decision creates a conflict of decision on the question of venue; and, that the decision of the Court of Appeals conflicts with applicable decisions of this Court concerning statutory construction.

The question of venue is, of course, an important question but we see nothing in this to warrant review. There are many questions of importance constantly decided by the Courts of Appeals and we understand that the functioning of the Courts of Appeals in this regard is to be reviewed by the Supreme Court only in exceptional cases,

for example, where there is conflict or where the Courts of Appeals have not acted.

In the present situation there is no conflict. The Seventh Circuit Court of Appeals is the only Court of Appeals which has passed on the question. It gave full and careful consideration to the question and we believe its decision is a sound one. Unless and until some other Court of Appeals differs, we see no reason to review the decision.

In an attempt to build up an atmosphere of conflict, petitioner points to the fact that there was a dissenting opinion in the Court of Appeals but this obviously creates no conflict. Petitioner in a further attempt to create an atmosphere of conflict points to three district court cases which, it says, reached a contrary result. However, one of these cases* is not only within the Seventh Circuit but is a decision by Judge Barnes himself and amounts to no more than the decision of Judge Barnes in the instant case which was reversed. The other two cases** are both in the Southern District of California and are the two cases which Judge Harrison of the Southern District of California stated he could not follow in the *Gulf Research* case.*** Not only did the Court of Appeals for the Seventh Circuit in the present case hold Judge Harrison's reasoning and decision to be correct, but the Court of

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* *Sponge Products* v. *Fuller Brush Company* (D. C. N. D. Ill., 1951), Civil Action 51 C 382, unreported and without opinion. However, we point out that the case included a number of grounds supporting the result. Petitioner in its brief in the district court conceded that the decision might have been based on these other grounds.

** *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al.* (D. C. S. D. Cal., 1950), Civil Action No. 8070-WM, unreported; *Farr Co.* v. *Gratiot, et al.*, 92 F. Supp. 320 (D. C. S. D. Cal., 1950).

*** *Gulf Research & Development Company, et al.* v. *Schlumberger Well Surveying Corporation*, 92 F. Supp. 16 (D. C. S. D. Cal., 1950).

Appeals for the Ninth Circuit, which ordinarily would be expected to reconcile any conflict of decision within its districts, declined to issue mandamus to reverse Judge Harrison and held that in its view no injustice had resulted from Judge Harrison's decision (*Gulf Research, etc. Co.* v. *Harrison,* 185 F. 2d 457). We think it only reasonable to assume that these earlier decisions alleged by petitioner to be conflicting would no longer be regarded as effective rules of decision even in the Southern District of California.

Petitioner attempts to show that the decision of the Court of Appeals in the instant case conflicts with applicable decisions of this Court but this contention will not withstand scrutiny. *Ex parte Collett* (337 U. S. 55) is cited, but in that case this Court considered and put great stress upon the very factors of statutory construction which moved the Court of Appeals in the instant case, namely, the legislative history of the Code. This Court there stated:

> "We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration" (p. 71).

In the present case the Court of Appeals stated:

> "Moreover, as heretofore stated, the Reviser's Notes unmistakably disclose that the only change made in the patent venue section as it then existed was one of phraseology and not of substance."

Moreover, the construction of the present statute by the Court of Appeals is exactly in accord with the decision of this Court construing the predecessor patent venue statute in the *Stonite* case.* In both cases a general venue

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* *Stonite Co.* v. *Melvin Lloyd Co.* (315 U. S. 561) (1942).

provision was held to be inapplicable to patent cases and the patent venue section was held to be the exclusive provision controlling patent cases.

Before concluding we should mention that mandamus is plainly an appropriate remedy in the instant case. The venue protection against expense and inconvenience of trial in a remote jurisdiction, which defendant asked for in the District Court, was denied. Since the requested protection was against expense and inconvenience of trial, the protection would be destroyed by trial and could not be restored by subsequent appeal. *Mandamus* is therefore plainly appropriate and the case presents no common ground with the case of *Gulf Research, etc. Co.* v. *Hon. Paul Leahy, et al.* in the Third Circuit, now before this Court on Petition for Writ of Certiorari. In that case a plaintiff invoked an asserted privilege of suing in one of several places and the Court held that if this privilege had been improperly denied it could be restored by a reversal on appeal after trial—quite a different question than is presented here.

Conclusion

It is submitted that there is no conflict of decision to warrant review by this Court; that the decision of the Seventh Circuit Court of Appeals is correct and is in accordance with the prior decisions of this Court. It is submitted that the petition should be denied.

Respectfully submitted,

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Counsel for Respondent.

April , 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,

Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,

Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit (R. 21) is reported at 194 F. 2d 410.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 1, 1952 (R. 31). The Petition for a Writ of Certiorari was filed with this Court on March 12, 1952, and was allowed by an order of this Court filed April 21, 1952. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

Statutes Involved.

The statutes involved are certain portions of revised Title 28, U. S. C., as follows:

"Section 1400. Patents and copyrights.

* * *

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

"Section 1391. Venue generally.

* * *

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Statement of the Facts.

The present proceedings originated with a complaint filed on June 26, 1951, by petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, charging respondent with infringement of certain patents owned by petitioner (R. 3, 7). The complaint in said action alleges, as to venue, that respondent "is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, * * *." (R. 7).

On July 12, 1951, respondent filed a motion to dismiss or, in the alternative, to transfer the action, on the grounds that it was a corporation of Delaware and that it was

neither alleged nor was it the fact that acts of infringement by respondent had occurred within the Northern District of Illinois (R. 3, 4, 9). The Honorable John P. Barnes, Chief Judge of the United States District Court for the Northern District of Illinois, to whom the case was assigned, on October 15, 1951, denied respondent's motion and ordered respondent to answer (R. 13).

On October 29, 1951, respondent filed with the Court of Appeals for the Seventh Circuit its Petition for a Writ of Mandamus directing Judge Barnes to nullify, vacate and set aside the aforesaid order denying respondent's motion (R. 2). Judge Barnes, as respondent, filed his answer to the petition on November 15, 1951, disclaiming interest in the cause or the issues thereof other than such interest as any other citizen of the United States should have (R. 14). Thereupon, petitioner, on November 27, 1951, applied for leave to intervene, to file a pleading in opposition to the Petition for the Writ of Mandamus, to file a brief and to participate in oral argument. Such leave was granted by the Court of Appeals on November 27, 1951 (R. 16) and petitioner's answer was filed on December 7, 1951 (R. 17).

After briefs were filed and oral arguments heard, the Court of Appeals entered its judgment on February 1, 1952, directing Judge Barnes to (1) dismiss the case or (2) if it be in the interest of justice, to transfer the same to the appropriate district (R. 31). The decision was by a divided court with an opinion filed by the majority (R. 21), and a dissenting opinion filed by Judge Lindley (R. 30).

Respondent admitted in its Petition for Mandamus that it was licensed to do business and had a place of business within the Northern District of Illinois (R. 4). It has been and is respondent's contention, however, that despite

such admission it is not a resident of the Northern District of Illinois and that since there is no allegation of the commission by respondent of infringing acts in such district, the venue of the patent infringement action is improper.

Petitioner admits that there is no allegation that respondent has committed acts of infringement within the Northern District of Illinois (R. 17). It is petitioner's contention, however, that because respondent concededly is licensed to do business and has a place of business in the Northern District of Illinois, such district is the district of residence of respondent for venue purposes and that, accordingly, it was entirely proper for petitioner to institute its suit against respondent for patent infringement in such district under the provisions of Sections 1400(b) and 1391(c) of revised Title 28, U. S. C.

Specification of Errors.

The court below erred:

(1) In holding that the Congressional definition of corporate residence "for venue purposes" contained in Section 1391(c) of revised Title 28, U. S. C., does not define the judicial district in which a corporate defendant "resides" as provided in Section 1400(b) relating to venue in patent infringement actions;

(2) In creating an ambiguity in the conceded plain and unambiguous language of Section 1391(c) by reference to and reliance upon the Reviser's notes and legislative history.

Summary Of Argument.

I. The venue provisions of revised Title 28 clearly permit a corporation to be sued for patent infringement in any district in which it is doing business or is licensed to do business 8

The Congressional definition of corporate residence in Section 1391(c) applies to Section 1400(b) under the plain language of both sections 8

Under Section 1400(b) a patent infringement action may be brought in the district where defendant "resides" 8

Congress for the first time defined residence of a corporation for venue purposes in Section 1391(c) 8

The language is all inclusive and is unambiguous, direct, clear, unmistakable and without qualification. Cf. *Ex Parte Collett*, 337 U. S. 55, 58 9

The applicability of the definition in Section 1391(c) to Section 1400(b) is supported by the weight of authority 10

The question before this Court for decision has been passed upon by only two Courts of Appeals 10

In *Dalton* v. *Shakespeare Co.*, 196 F. (2d) 469 (1952), the Court of Appeals for the Fifth Circuit in a unanimous decision decided that the plain language of the statutes controls 10

In the instant case, the Court of Appeals for the Seventh Circuit, with Judge Lindley dissenting, while conceding that the guage employed by Congress was clear and free from ambiguity, nevertheless reached a contrary result 10

The Court of Appeals for the Fifth Circuit unanimously agreed with the view of

Judge Lindley who dissented in the instant case 10

In *Farr Co.* v. *Gratiot*, 92 F. Supp. 320 (1950), the District Court for the Southern District of California reached the same conclusion as that reached by the Fifth Circuit Court of Appeals and by Judge Lindley in his dissent in the instant case 12

In two other cases district judges have held that the Congressional definition of corporate residence applies to patent infringement actions 13

This view is supported by Professor Moore in "Moore's Commentary on the U. S. Judicial Code" (1949) and in the Cyclopedia of Federal Procedure (3rd Edition, 1951) Volume 3, page 75 14

Six decisions by district courts hold that Section 1391(c) does apply to venue provisions found in separate statutes 15

II. It was error for the court below to rely on the Reviser's notes and legislative history 16

As was pointed out by Judge Lindley in his dissenting opinion, the court below not only construed Section 1391(c) but rewrote the section so as to add the phrase "except in patent infringement cases" 17

The rule that where the statutory language is clear there is no need to refer to the legislative history has been consistently applied by this Court and recently reiterated in its opinion in *Ex Parte Collett*, 337 U. S. 55, 61, 69 S. Ct. 944 (1949) 17

III. Even though legislative history cannot prevail over the unambiguous language of the statute here, the plain meaning of Section 1391(c) is not at variance with its legislative history or with the intent of Congress to broaden venue with respect to corporate defendants 18

There is no reason why corporations should be treated differently in patent cases than in any other cases nor is there any expressed intent by Congress to do so 19

The fact that alternative grounds of venue can be and many times are satisfied does not mean that the alternatives or either of them are meaningless 20

The Reviser's notes nowhere comment on the definition of corporate residence in Section 1391(c) which is an entirely new provision 20

Subsequent writings of the principal Revisers demonstrate that a change was made in the law 21

IV. The decisions in *Stonite Products Co.* v. *Melvin Lloyd Co.* and related cases relied on by the court below are not in point 23

In *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 662 S. Ct. 780 (1942) this Court was faced with inconsistent and mutually exclusive provisions regarding venue 24

If the *Stonite* decision had been to the contrary a defendant could have been sued for patent infringement in a district wherein it was neither a resident nor where it had committed acts of infringement thus directly violating the patent venue provision 24

In the instant case the question is whether one of the alternative grounds of venue in patent infringement actions to-wit, residence, is defined by a complementary definition of corporate residence 24

Four of the cases relied upon in the majority decision of the Court below do not involve the present question but rather the identical question presented in the *Stonite* case 25

No one of the three further cases relied upon is controlling here 25

ARGUMENT.

I.

The Venue Provisions Of Revised Title 28 Clearly Permit A Corporation To Be Sued For Patent Infringement In Any District In Which It Is Doing Business or Is Licensed To Do Business.

A.

The Congressional definition of corporate residence in Section 1391(c) applies to Section 1400(b) under the plain language of both sections.

Revised Title 28, U. S. C., Section 1400(b) covers venue in patent infringement actions and provides that such actions may be brought "where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business". The word "resides" is new in this provision. The same term, or its equivalent noun "residence", is used frequently in other sections of Chapter 87 of revised Title 28, U. S. C., all of which pertain to venue.*

Congress did not leave the question of what should constitute the residence of a corporation for venue purposes to speculation or to future determination. For the first time it incorporated in the venue provisions a specific, clear and unambiguous definition of such residence. This definition is found in Section 1391(c):

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* "Resides", "residing" or "residence" is specified as a basis for venue in the following sections: 1392(a)—actions involving multiple defendants in different districts; 1393(a)—actions involving districts containing more than one division; 1393(b)—actions involving defendants residing in different divisions of the same district or different districts in the same state; 1396—actions for the collection of internal revenue taxes; 1397—interpleader actions; 1398—actions to enforce Interstate Commerce Commission's orders; 1400(a)—actions on copyrights; 1400(b)—actions for patent infringement; 1402(a)—actions against the United States; 1402(b)—tort claims against the United States.

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The language used in 1391(c) is without qualification. It plainly states that the residence of a corporate defendant as therein defined shall be its residence "for venue purposes". There is not the slightest hint that the definition should apply for some venue purposes and that others should be excluded. On the contrary, the language is all inclusive and clearly applies to every venue provision contained within the entire chapter as well as to venue provisions contained in separate statutes, such as those governing actions under the Jones Act and actions under the Clayton Act.

A very similar question concerning venue was before this Court recently in *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949).* There, this Court held that Section 1404(a) of revised Title 28, U. S. C., providing for the transfer of actions under certain conditions, applied to actions brought under the Federal Employers' Liability Act, although previously the doctrine of *forum non conveniens* had been held not available in such suits.** This Court reached a similar decision with reference to venue in anti-trust suits in *United States* v. *National City Lines*, 337 U. S. 78, 69 S. Ct. 955 (1949), despite its previous ruling that *forum non conveniens* was not applicable in such cases.***

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* See also **Kilpatrick v. Texas & P. Ry. Co.**, 337 U. S. 75, 69 S. Ct. 953 (1949).

** **Baltimore & Ohio R. Co. v. Kepner**, 314 U. S. 44, 62 S. Ct. 6 (1941); **Miles v. Illinois Central R. Co.**, 315 U. S. 698, 62 S. Ct. 827 (1942).

*** **United States v. National City Lines**, 334 U. S. 573, 68 S. Ct. 1169 (1948).

In its opinion in *Ex Parte Collett,* 337 U.S. 55, 58, this Court held that the language of Section 1404(a) was unambiguous, direct, clear, unmistakable and without qualification. It is submitted that the language of Section 1391(c) is just as unambiguous, direct, clear, unmistakable and without qualification. It defines the residence of corporate defendants for venue purposes in all actions, whether such venue be found in subsequent provisions of Chapter 87, such as Section 1400 (b), or is found in the provisions of separate statutes.

B.

The applicability of the definition in Section 1391(c) to Section 1400(b) is supported by the weight of authority.

The question before this Court for decision has been passed upon by only two Courts of Appeals. The Court of Appeals for the Fifth Circuit in a unanimous decision in *Dalton* v. *Shakespeare Company,* 196 F. 2d 469 (1952), decided that the plain language of the statutes controls. In the instant case the Court of Appeals for the Seventh Circuit, with Judge Lindley dissenting, while conceding that the language employed by Congress was clear and free from ambiguity, nevertheless reached a contrary result. 194 F. 2d 410 (R. 21).

The Fifth Circuit unanimously agreed with the view of Judge Lindley and reversed the order of the District Court in the *Dalton* case dismissing the action for patent infringement on the ground of improper venue. In its opinion, that court recognized that the question was debatable, but then said (196 F. 2d 469, 472):

> "It does not follow, however, that because it is debatable, the question is insoluble or that a solution of it may not be found in the plain language of the

statute. Indeed it seems to us that the difficulties arise not out of the words the statute used but out of the strained efforts to make them read otherwise than as they do."

The court rejected the majority opinion in the instant case, holding at page 472:

"* * * We are unable to follow the opinion of the majority in the *C-O-Two Fire Equipment Co.* case, *supra,* that the contention of appellant will introduce an inconsistency into 1400(b). We think, on the contrary, that if the word 'resides', as used in 1400(b), is given the statutory definition of residence, set out in 1391(c), Section 1400(b) will be rendered more clear and workable. If, on the contrary, we must look elsewhere than in Section 1391(c) for the meaning of the word 'resides', as it appears in Section 1400(b), we will be placed in the untenable position of searching for light in language which has been deliberately abandoned instead of in language deliberately chosen out of the experience of the past and carefully defined for the future.

"If Congress had intended the definition of Section 1391(c) to be limited to certain types of actions, congress would, we think, have plainly said so. If, on the contrary, congress had intended to provide that corporations are, for venue purposes, residents of those districts in which they are doing business, regardless of the particular wrong with which the corporation may be charged, it, by using the word 'residence' in Section 1391(c) and 'resides' in Section 1400(b), certainly took the right course to do so.

"We see no reason for straining, as opinions taking the contrary view appear to us to do, to find that the definition of 'residence' contained in Section 1391 (c) should not be consistently applied as the definition of 'residence' applicable to all corporate defendants. * * *"

It was the view of Judge Lindley, in his dissenting opinion below in the instant case, that to hold otherwise would result in "judicial legislation". Judge Lindley said (194 F. 2d 410, 415-416):

> "The problem here seems to me a simple one. Section 1400(b) of Title 28 U. S. C. provides, in its very first clause, that an action 'for patent infringement may be brought in the judicial district where the defendant resides'. Sec. 1391(c) of Title 28 U. S. C. prescribes that the district in which a corporation is incorporated or licensed to do business or is doing business 'shall be regarded as the residence of such corporation for venue purposes.' The intervenor, plaintiff below, averred in its complaint that defendant, petitioner here, is a corporation licensed to do business in Illinois and is doing business within the Northern District of Illinois, thus bringing defendant within the class of corporate defendants whose residence is, by virtue of Sec. 1391(c), within the Northern District of Illinois. It seems to me that the District Court could not have done other than it did without doing violence to the clear provisions of the two sections. Inasmuch as defendant is a resident of the Northern District of Illinois, by virtue of the express provisions of Sec. 1391(c), plaintiff had a right, under Sec. 1400(b), to bring the suit in that District. To hold otherwise seems to me to require that we interpolate at the end of Sec. 1391(c) the phrase 'except in patent infringement cases.' To do so is beyond our function. I would deny the petition."

The District Court for the Southern District of California reached a similar conclusion in *Farr Co.* v. *Gratiot*, 92 F. Supp. 320 (1950). Judge Hall there held that, since the defendant corporation in that case was concededly doing business in the district, it therefore resided in the district for the purpose of venue under the first alternative

clause of Section 1400(b). In so holding, the court said, among other things (92 F. Supp. 322):

> "* * * The 1948 Judicial Code has many changes in it and many additions to it, which must be read together with any individual section; for instance, the addition of Sections 1404(a) and 1406 just mentioned. To accept the defendants' contention would be to say that these two sections apply to neither 1400(a) nor 1400(b). Moreover, Sections 1393 to 1404 inclusive, each deal with venue in particular types of cases. Residence is the basis of venue in many of them: * * * To adopt the construction contended for by the defendants, would be to say that Section 1391(c) with its definition of residence either applied to Sections 1393(a), 1396, 1397, 1398, 1400(a), and 1402, but did not apply to 1400(b); or to say that it applies to none of them, which would leave it meaningless.
>
> "The long and short of defendants' contention would be to require judicial legislation by adding to the end of Section 1391(c), the phrase, 'except in patent litigation;' which would also require a different meaning to the word 'resides' in Section 1400(b), than that given to it in any other section; and in fact would require the court to judicially legislate as to its meaning."

A similar result was reached by Judge Mathes of the same district in California in *Radio Corporation of America* v. *Paramount Pictures, Inc., et al.* (Civil Action, No. 8070-WM, 1950, unreported).

Similarly, Judge Barnes, whose denial of the respondent's motion to dismiss in the original patent suit resulted in the present mandamus proceedings, reached the same determination in *Sponge Products* v. *Fuller Brush Company* (D.C.N.D. Ill., 1951, Civil Action No. 51 C 382, unreported).

The foregoing decisions, which are squarely in point, are fully in accord with the views expressed by Professor James William Moore in "Moore's Commentary on the U. S. Judicial Code" (1949). In discussing Section 1391 (c) the author states (page 178):

> "* * * And, what is far more important, a corporate *defendant* may under § 1391(c) be a resident of many districts for purposes of applying the above venue rules, whereas formerly a corporation was a resident of only one district." (Moore's emphasis.)

With reference to special venue coverage Professor Moore says (pages 178-179):

> "* * * But, and this is very important, all special venue provisions, whether within Title 28 or some other title, must be read in connection with the following general provisions:"

quoting, among others, Section 1391(c).

Concerning the effect of Section 1391(c) on Section 1400(b) the same author says (pages 184-185):

> "* * * Subsection (b) of § 1400 carries forward without substantial change the venue provisions of former 28 USC § 109 dealing with patent infringement actions; but the general provisions of § 1391(c) dealing with the residence of a corporate defendant, and § 1391(d) to the effect that an alien may be sued in any district will have a qualifying effect when such parties are defendants to a patent infringement action. * * *"

And, again, at page 194:

> "This [1391(c)] is a provision of general applicability to a corporate defendant, whether the case be one governed by a general venue provision, or by a special venue provision within Title 28, such as § 1400(b) governing a patent infringement action, or by a special venue provision contained in some other title of the United States Code." (Bracketed material supplied)

Edward L. Barrett, Jr., Associate Professor of Law, University of California, is in accord with Professor Moore. In his article "The Federal Judicial Code of 1948" appearing in "Journal of the State Bar of California", Vol. XXIII, No. 5, 1948, page 324, the author says (page 331):

> "The express provision that the district in which a corporation is licensed to do business or is doing business 'shall be regarded as the residence of such corporation for venue purposes', should apply in all special venue statutes."

The same conclusion is reached in Cyclopedia of Federal Procedure (3rd Ed., 1951) Vol. 3, page 75, where it is stated with regard to patent infringement actions:

> "The present general venue statute, of course, broadens the matter even more by providing that a corporation may be sued in any district in which it is incorporated or licensed to do business or is doing business, and that such district shall be regarded as its residence for venue purposes."

The foregoing authorities are all concerned with the specific issue presently under consideration, *viz.* whether or not the general definition of corporate residence for venue purposes found in Section 1391(c) applies to one of the specific venue sections of revised Title 28, namely, Section 1400(b). Each of them holds that it does.

In addition there are, so far as petitioner's research has disclosed, six decisions by district courts holding that Section 1391(c) does apply to the venue provisions found in separate statutes. Four of the decisions hold that the definition in Section 1391(c) applies to actions brought under Title 46 U. S. C. Section 688 (the Jones Act): *Bagner* v. *Blidberg Rothchild Company*, 84 F. Supp. 973 (D.C. E.D. Pa., 1949); *Bounds* v. *Streckfus Steamers*, 89 F. Supp. 242 (D.C. Del., 1950); *Mincy* v. *Detroit & Cleveland Navigation Company*, 94 F. Supp. 456 (D.C. S.D. N.Y.,

1950) and *Phillips* v. *Pope & Talbot, Inc.*, 102 F. Supp. 51 (D.C. S.D. N.Y., 1952). In the other two cases the courts held that the definition applied to actions under the Clayton Act, where venue is controlled by Title 15 U. S. C. Section 22: *Lipp, et al.* v. *National Screen Service Corporation*, 95 F. Supp. 66 (D.C. E.D. Pa., 1950); *Bertha Bldg. Corp.* v. *National Theaters Corp.*, 103 F. Supp. 712 (D.C. E.D. N.Y., 1952).

Certainly Section 1400(b) of revised Title 28, U. S. C., is no more a "special" venue provision than are the venue provisions of the Jones Act and the Clayton Act. Yet, the courts which have considered the question have unanimously held Section 1391(c) applicable to the latter. It it submitted that the same result should obtain as to Section 1400(b).

Since respondent was concededly licensed to do business and was doing business in the Northern District of Illinois (R. 4), petitioner respectfully submits that such district was the residence of respondent for venue purposes and that the venue of the patent infringement action by petitioner against respondent was properly laid in that district. The decision of the Court of Appeals for the Seventh Circuit should be reversed.

II.

It Was Error For The Court Below To Rely On The Reviser's Notes And Legislative History.

In its majority opinion the Court of Appeals admitted that the language in Section 1391(c) is clear, plain and unambiguous and is not susceptible to interpretation or construction, 194 F. 2d 413 (R. 24-5). However, the court below then went on to find that Section 1391(c) did not apply to Section 1400(b), following the erroneous reason-

ing of Judge Harrison in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16 (D.C. S.D. Cal., 1950). The latter is the only reported decision squarely deciding the question adversely to petitioner's contention and the authorities referred to under the preceding point of this brief.

It is indeed strange that the court below should rightly agree that the language of Section 1391(c) is plain, clear and unambiguous but at the same time hold the section to be inapplicable to Section 1400(b), a venue provision. As Judge Lindley pointed out in his dissenting opinion, in so doing the court below not only construed Section 1391(c) but rewrote the section so as to add at the end thereof the phrase "except in patent infringement cases". This, of course, is pure judicial legislation which is beyond the function of the courts.

Both the majority of the court below and Judge Harrison relied extensively upon the Reviser's notes and the legislative history of the development of the venue provisions of the revised Judicial Code. As previously demonstrated in the preceding point, and as admitted by the court below in the majority opinion, Section 1391(c) is clear, plain and unambiguous. Accordingly, the rule which has been consistently applied by this Court and recently reiterated in its opinion in *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), is controlling here. It forbids resort to either the Reviser's notes or the legislative history. After holding that the language of Section 1404(a) was direct, clear, and not ambiguous, this Court repeated the applicable rule of statutory construction as follows (p. 61):

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history

> where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco* v. *Walling*, 1945, 324 U. S. 244, 260, 65 S. Ct. 605, 614, 89 L. Ed. 921. This canon of construction has received consistent adherence in our decisions."

It has been repeatedly held that where the statutory language is clear it is improper to resort either to legislative history or to speculation in an endeavor to show some unexpressed intent of Congress. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 277, 49 S. Ct. 133 (1929); *United States* v. *Standard Brewery*, 251 U. S. 210, 217, 40 S. Ct. 139 (1920).

It is submitted that just as in the *Collett* case there is no need or license in the present case to resort to legislative history or the Reviser's notes since the language of both Section 1400(b) and Section 1391(c) is plain, clear and unambiguous.

III.

Even Though Legislative History Can Not Prevail Over The Unambiguous Language Of The Statute Here, The Plain Meaning Of Section 1391(c) Is Not At Variance With Its Legislative History Or With The Intent Of Congress To Broaden Venue With Respect To Corporate Defendants.

The court below in its majority opinion, following the erroneous reasoning in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16 (D.C. S.D. Cal., 1950), said that there was no purpose discernible on the part of Congress to eliminate or minimize the privilege afforded defendants in patent cases, that no purpose to change the previous law as to corpo-

rate defendants in patent infringement proceedings appeared from a reading of Sections 1391(c) and 1400(b) or from the Reviser's notes in connection therewith, and that said notes disclosed that the only changes made in the patent venue section were ones of phraseology and not of substance. 194 F. 2d 410, at 413, 414 (R. 25, 27).

Petitioner does not contend that any change was made in Section 1400(b) other than the significant substitution of the word "reside" for the phrase "is an inhabitant". That section plainly gives to defendants in patent proceedings the same privilege as previously existed, to wit, to be sued in the district of residence or where they had a regular and established place of business and had committed infringing acts. On the other hand, there is no reason why corporations should be treated any differently in patent cases than in any other cases; nor is there any expressed intent by Congress to do so. Accordingly, the general definition of corporate residence for venue purposes provided by Congress in Section 1391(c) applies and clearly was intended to apply to corporate defendants in all types of actions, including those for patent infringement.

Both the court below, in its majority opinion, and Judge Harrison in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16 (D.C. S.D. Cal., 1950), were also of the opinion that if the statutory definition of corporate residence in Section 1391(c) is applied to patent infringement cases, then the alternative ground of venue in such cases, *i. e.*, where the defendant has committed acts of infringement and has a regular and established place of business, would become meaningless. This position, of course, disregards the fact that the statutory provision for venue in patent infringement cases is broadly

drawn to provide for venue in all cases, whether the defendant is an individual or a corporation. Patent suits are constantly brought in districts in which both individual and corporate defendants reside and have committed acts of infringement and have regular and established places of business. The fact that the alternative grounds of venue can be, and many times are, satisfied does not mean that the alternatives, or either of them, are meaningless.

The court below was of the opinion that somehow Congress intended to restrict suits for patent infringement against a corporate defendant to the district where it was incorporated. If this were the case, it is submitted that Congress would have plainly said so in recasting Section 1400(b); but Congress did not do this. Instead, it used the new word "resides", which applies to all defendants, be they corporate or individual; and it then prescribed the statutory definition of "residence for venue purposes" in the case of corporations.

Although there are Reviser's notes under both Section 1391(c) and Section 1400(b), the notes nowhere comment upon the definition of corporate residence in Section 1391 (c) which, on the face of the statutes, is a new provision. No comparable provision had previously existed. It is submitted that the Reviser's notes included no comment on this definition for the reason that it was apparent on its face that it was a new provision and, as previously pointed out, the plain language of Section 1391(c) applies to all corporations in all actions under all venue provisions.

The rule is that expression of intent to change may be found in the terms of the statute itself. Indeed, the subsequent writings of the principal Revisers amply demonstrate such intent.

The revision staff for the new Judicial Code consisted of four men: Chief Reviser William W. Barron, Department of Justice; Frank J. Parker, Assistant United States Attorney for New York; Professor James William Moore, Yale Law School; and the Honorable Alexander Holtzoff, Judge of the United States District Court for the District of Columbia. As previously set forth herein (*supra*, page 14), Professor Moore in his "Commentary on the U. S. Judicial Code" repeatedly points out that all special venue provisions are qualified by Section 1391(c), and he specifically states that the latter section applies to Section 1400(b).

Barron and Holtzoff in their work "Federal Practice and Procedure" (1950), Volume I, Section 80, Pages 153-4 state with reference to Section 1391(c) the following:

"§80. *Corporation, Associations, etc., as Parties*

"It was long the rule that, for venue purposes, a corporation was a resident only of the state wherein it was incorporated, and that it was not a resident of another state even though it did business or appoint an agent for service of process there.

"It was perhaps inevitable that the expanding economy of the nation and the nation-wide activities of great corporations should eventually render intolerable a rule which restricted federal suits to the district of incorporation, especially if the district was remote from the scene of corporate activities. And so the time came when by judicial construction the Supreme Court held a corporation suable in any district in which it is licensed to do business or in pursuance of state law has appointed an agent for service of process. Such compliance with state law is deemed a waiver of the privilege to be sued in the state of incorporation and conclusive evidence of consent to be sued elsewhere.

"Congress took the next long step by enacting into law the provision that 'a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.' * * *"

In the pocket part for 1952 of the same work, the authors further state, Section 80, Page 41:

"§80. *Corporation, Associations, etc., as Parties*

"Under 28 U.S.C.A. § 1391(c), it is clear that in an action against a corporation, any district in which it is incorporated or licensed to do business or doing business is regarded as its residence for venue purposes. * * *"

Barron and Holtzoff do not disagree with Professor Moore regarding the applicability of Section 1391(c) to Section 1400(b). Their only comment on this point is found in the 1952 pocket part under Section 83, Page 42, in which the authors note "some conflict of decision" on the question, referring to cases discussed in this brief. However, the authors themselves express no opinion independently of the decisions cited.

Apparently Mr. Parker, the fourth Reviser, has not published any views concerning the matter. Thus, three of the four Revisers agree that Section 1391(c) of the new Judicial Code changes venue requirements in spite of the fact that the Reviser's notes regarding such change were completely silent. It is submitted that the absence of any note as to such change is not only no ground for reading the statutory provision directly contrary to the plain language thereof but is also contrary to the views of the majority of the Revisers subsequently expressed by them.

The plain language of Section 1391(*c*) must control; otherwise, as erroneously concluded by the court below, the law is to be determined not from the statute as written but rather by sheer implication from silence on the point in the Reviser's notes.

IV.

The Decisions In Stonite Products Co. v. Melvin Lloyd Co. And Related Cases, Relied On By The Court Below, Are Not In Point.

Following the lead of Judge Harrison in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16 (D.C. S.D. Cal., 1950), the court below in its majority opinion relied upon the decision of this Court in *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561, 62 S. Ct. 780 (1942), as decisive of the question in issue here and, like Judge Harrison, the court also cited several cases of the district courts following the *Stonite* decision as authority in support of the conclusion which it reached. It is respectfully submitted that none of said authorities is in point on the question presently before this Court and that the reliance upon them by the court below was error.

The *Stonite* case was decided before the revision of the Judicial Code. It is true that this Court there held that the patent infringement venue section, Section 48 of the old Judicial Code, was the exclusive provision controlling venue in patent infringement actions. It is also true that this Court held that the provision of the old Code (Section 52), which permitted suits against two or more defendants residing in different judicial districts within the same State to be brought in either district, was inapplicable to infringement suits. Accordingly, it was held that a corporate defendant, which was an inhabitant of the Eastern Dis-

trict of Pennsylvania,* could not be sued in a patent action in the Western District of Pennsylvania under Section 52 (now Section 1392(a) of the revised Judicial Code) because the co-defendant was an inhabitant of such district, where said defendant corporation did not have a regular and established place of business in the Western District.

This Court was faced in the *Stonite* decision with inconsistent and mutually exclusive provisions regarding venue. Had the Court there held Section 52 (now Section 1392(a)) to control the venue, the particular defendant involved would have been sued for patent infringement in a district other than that of its residence or where it had committed acts of infringement, thus directly violating Section 48 (now Section 1400(b)). But such is not the present situation. The Court is here concerned with only one venue provision which prescribes as one of the proper forums the district of residence (Section 1400(b)), and also with a complementary definition of corporate residence applicable to all venue provisions, whether in subsequent sections of the same chapter or in separate and independent statutes (Section 1391(c)). Here, the action was instituted in a district in which respondent is a resident for venue purposes. Thus, the *Stonite* decision is without application to the present question.

Both the court below, in its majority opinion, and Judge Harrison also relied on four cases which they

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* Prior to the 1948 revision of the Judicial Code, it was held that a corporation was an inhabitant of the district where its official residence was designated by charter or state law and, in the absence of such a designation, then in a district where the corporation maintained its home office. **Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales** (1894) 151 U. S. 496, 14 S. Ct. 401, 38 L. ed. 248; **Suttle v. Reich Bros. Const. Co.** (1948) 333 U. S. 163, 68 S. Ct. 587, 92 L. ed. 614; **Edgewater Realty Co. v. Tenn. Coal, Iron & Railroad Co.** (D Md. 1943) 49 F. Supp. 807, 809; **Kibler v. Transcontinental & Western Air** (ED NY 1945) 53 F. Supp. 724.

claimed decided the present question. These cases are *Ackerman* v. *Hook*, 183 F. 2d 11 (C.A. 3rd, 1950); *Fischer* v. *Karl*, 84 F. Supp. 53 (D.C. E.D. N.Y., 1949); *Arkay Infant's Wear, Inc.* v. *Kline's, Inc.*, 85 F. Supp. 98 (D.C. W.D. Mo., 1949) and *Rava* v. *Westinghouse Electric Corporation*, 90 F. Supp. 707 (D.C. S.D. N.Y., 1950).

Not one of these cases even mentions Section 1391(c), the provision here in question. On the contrary, each of these cases followed the *Stonite* decision; and in three of them the question identical to that presented in the *Stonite* case was before the court. None of these cases is applicable in the present situation for the same reasons which render the *Stonite* decision inapplicable.

The court below relied additionally upon three further cases. We submit that none of them is controlling here.

Curtis v. *Madovoy*, 84 F. Supp. 637 (D.C. E.D. N.Y., 1949) did not even mention Section 1391(c). The District Court there again followed the *Stonite* decision and held that Section 1400(b) prevailed over the inconsistent provisions of Section 1392(a). It, too, is not in point for the same reasons as set forth with reference to the *Stonite* decision.

It is true that in *Nachtman* v. *Jones*, 90 F. Supp. 739 (D.C., D. of Co., 1950), the district court said, after referring to the *Stonite* case, that if Section 1391(c) was applied to Section 1400(b), the latter section would be nullified. However, it should be observed that the complaint did not contain any allegation that the defendant resided in the District of Columbia. Further, the court went on to state the factual issue of whether or not the admitted maintenance of a place of business in the Dis-

trict of Columbia by the defendant "solely for the soliciting of orders" constituted "residence" within the District, but then said it was unnecessary to determine such issue because the case should be transferred for convenience and in the interests of justice. If the court had decided that Section 1391(c) did not apply to the patent infringement action, it is indeed difficult to perceive why it was found necessary to state the issue as to whether or not admitted acts of the defendant constituted a factual basis for one of the alternatives within Section 1391(c). Finally, it should be further pointed out that the ruling of the court was based on Section 1404(a). The court transferred the case after first finding that "it would be in the interests of justice" so to do (90 F. Supp. 741). It is evident that the court acted under Section 1404(a) since it had first stated that it was unnecessary to determine the question of residence. It clearly was acting under the doctrine of *forum non conveniens* rather than transferring the case to a proper district from an improper district.

Lastly, the court below relied on an unreported decision by Judge Igoe in the District Court of the Northern District of Illinois, *Aetna Ball & Roller Bearing Co.* v. *The Federal Bearing Co., Inc.* (Civil Action No. 50 C 857). It appears from the files in that case that the defendant showed that it was not licensed to do business in Illinois and had no regular place of business in Illinois (the contrary of both conditions is admitted by the respondent here) and, further, that the person upon whom service was made was only a sales representative without authority. The defendant moved to quash the service of process setting up each of the foregoing grounds and, in addition, the claim that it had not committed acts of infringement within the district. The

remarks of the district judge regarding Section 1400(b) were wholly unnecessary to a decision allowing the motion to quash.

It is respectfully submitted that the decision of Judge Harrison in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16 (D.C. S.D. Cal., 1950), and the decision of the court below are not well reasoned; that the authorities relied upon in both opinions are not pertinent to the question presently before this Court; that both opinions are contrary to the authorities cited under Point I of this Brief holding that Congress meant exactly what it said in Section 1391(c) and 1400 (b); and that, accordingly, a corporate defendant may be sued for patent infringement in any district in which it resides, to wit, any district where it is incorporated or is licensed to do business or is doing business.

CONCLUSION.

Petitioner submits that for the foregoing reasons the judgment of the Court of Appeals for the Seventh Circuit should be reversed and that the petition of respondent for a Writ of Mandamus be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 25

CARDOX CORPORATION,

Petitioner,

v.

C-O TWO FIRE EQUIPMENT COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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In the

Supreme Court of the United States

October Term, 1952

No. 25

Cardox Corporation,

Petitioner,

v.

C-O Two Fire Equipment Company,

Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

The case comes here on Writ of Certiorari to review an order of the Seventh Circuit Court of Appeals entered February 1, 1952 (R. 31).

The order directed the District Court (Judge Barnes) to either dismiss or transfer the case of *Cardox Corporation* v. *C-O Two Fire Equipment Company*, a patent infringement suit, on the ground that venue was improperly laid under Title 28, § 1400(b) and that respondent was entitled to the venue protection of that section. The court sustained respondent's contention that Title 28, § 1391(c), relating to general corporate venue does not change the time-honored venue protection of the patent venue section, § 1400(b).

The issue is solely one of statutory construction.

The opinion by Chief Judge Major (Judge Swaim concurring) will be found at pages 21, *et seq.* The dissent by Judge Lindley will be found at page 30. They are reported in 194 F. 2d 410. There was no opinion by the District Court; its order will be found at page 13 of the record.

Comment on Mandamus Procedure

Procedurally the matter came before the Court of Appeals by petition for Writ of Mandamus to set aside an order of the District Court which refused respondent herein the claimed protection of § 1400(b). The propriety of the Mandamus procedure is not involved.

Petitioner conceded below and has conceded here (Brief on Petition for certiorari, p. 4) that if respondent is correct as to the venue protection accorded by the statute, a Writ of Mandamus is the appropriate way to correct the action of the District Court. The Court of Appeals held without dissent (R. 23):

> "In the beginning, we conclude that this court has the power to issue the writ of mandamus and, if petitioner is correct in its position, that it is an appropriate case for the exercise of such power. *Ford Motor Co., et al.* v. *Ryan,* 182 F. 2d 329, 330; *Paramount Pictures, Inc., et al.* v. *Rodney,* 186 F. 2d 111, 116. Cf. Ex Parte Collett, 337 U. S. 55 * * *."

The propriety of Mandamus seems self-evident from the facts. Respondent is claiming a statutory protection against the expense and inconvenience of being forced by petitioner to stand trial in a place remote from the place where respondent conducts his business and has committed the disputed acts of infringement. If this protection exists, the court is without power to entertain the action and respondent is entitled to the protection at the outset for, if it does not secure it then, it will never secure it.

Appeal after trial affords no remedy because the burdensome expense and inconvenience will then have occurred—the protection will have been destroyed, and what has been done cannot be undone. Appeal before trial is not possible—an order refusing to dismiss, as here, is not appealable. Hence, the only procedure by which respondent can secure protection is Writ of Mandamus.

In the words of this Court in *Ex parte Fahey*, 332 U. S. 258, at 260, this is a case where "* * * appeal is a clearly inadequate remedy" and Mandamus is the proper procedure.

Statement of Facts

The action was begun by petitioner June 26, 1951 in the United States District Court for the Northern District of Illinois, Eastern Division.

Petitioner might have sued in Delaware where respondent is incorporated or in New Jersey where respondent has its office and plant and where it committed the disputed acts of infringement. But, instead, petitioner sued in Chicago where, though respondent is licensed to do business, it has done none of the accused business and has only a small office (two salesmen) for purposes of other business (R. 11, 12).

The complaint alleges that the action arises under the Patent Laws of the United States and venue is based on the allegation (R. 7):

> "2. Defendant, C-O Two Fire Equipment Company, is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois."

There is no allegation or contention that respondent committed any acts of infringement within the Northern District of Illinois.

Respondent, in order to secure the protection afforded by the venue provision for patent infringement suits (28 U. S. C. 1400(b)) filed a motion on July 12, 1951 that the complaint be dismissed for improper venue. A copy of said motion and supporting affidavits appear at R. 9-12.

The grounds of said motion were that § 1400(b) had not been complied with in either of the statutory venue requirements; namely, the suit had not been brought in the district of respondent's incorporation, nor had it been brought in the district where respondent had a regular and established place of business and had committed the alleged acts of infringement. § 1400(b) reads as follows:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Affidavits of the President, Scott E. Allen and the Secretary, Ralph F. Batch, of the respondent company, submitted in support of said motion, established that, although respondent was licensed to do business and had a small place of business within the Northern District of Illinois, such business as was transacted there, was not related to the alleged infringing acts and that respondent had committed no alleged infringing act within the Northern District of Illinois, but that it had committed acts of the kind complained of in the State of New Jersey where respondent maintains its principal office and manufacturing plant, keeps all its books and records relating to the disputed infringing activities and where its officers, engineers and employees who are acquainted with the disputed infringing activities are located (R. 10-12).

Respondent also suggested to the District Court that instead of dismissing the action, it would be appropriate to transfer said action under the discretionary provision of § 1406(a) of Title 28.

The District Court, without opinion, entered an order denying respondent's motion on the 15th day of October, 1951 (R. 13).

The Court of Appeals, by its order of February 1, 1952 (R. 31) sustained respondent's claim for venue protection and directed that this order be set aside and that the action be dismissed or transferred. This order was stayed (R. 32) pending action by this Court.

The Question Presented

The question presented is whether the special provisions of the patent venue statute, Title 28, § 1400(b), have been altered and enlarged by the provisions of the general corporation venue section, Title 28, § 1391(c), to permit a patent suit against a corporation in a district where the corporation has not infringed and is not incorporated, but where it is merely doing business or is licensed to do business.

The sections in question read as follows:

§ *1400—Patent and Copyrights*

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

§ *1391—Venue Generally*

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Argument

Summary.

Upon a first reading of these two sections it would appear that, inasmuch as § 1400(b) provides for venue in the place of residence for all defendants, whether corporate or otherwise, and that § 1391(c) provides that corporate residence includes the place where a corporation has a place of business or is licensed to do business, venue would be proper in the present case inasmuch as the action was brought in a district where respondent has a place of business, albeit a small one, and is licensed to do business.

It is on this that petitioner bases its contention.

However, an examination beyond this superficial view shows, as the Court below held, that this view is not sound, and that the sections are independent of one another, not complementary. A variety of considerations all lead to this conclusion, to wit:

1. Historically, the patent venue section was created as an independent section and always has been so applied. It wisely provided for venue both in the place of residence and in the place where the infringement is committed and limited it thereto. It has been found highly satisfactory and there never has been reason to change it.

2. This Court, in *Stonite Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942), has held that it is the exclusive provision controlling venue in patent infringement proceedings; that a general venue statute literally applying to all cases did not modify the patent venue section and did not apply to a patent infringement suit; that the reenactment of the patent venue section in a code with other sections literally applying to all cases did not destroy its independence.

3. It was settled law at the time the 1948 code was drafted and enacted that the patent venue section was an independent section. All Congress had to do to retain it as an independent section was merely to include it in the code.

4. Moreover, it was then settled law that, although corporations could be sued where incorporated, where licensed, and where doing business, this rule of corporate venue did not apply to patent cases. Including this rule in the code obviously would not affect patent venue.

5. The code section for service of process in patent cases (§ 1694) makes it explicit that the term "resides" in the patent venue section does not include the mere place of doing business as it does in the corporate venue section.

6. Any attempt to apply the corporate venue section to patent cases makes a portion of § 1400(b) meaningless.

7. Investigation of the legislative history reveals that there was no intention to change venue provisions in patent cases.

All these considerations point to and confirm the view that the patent venue provisions and the corporate venue sections are independent, not complementary. It is on these considerations that respondent's contention is based.

The Patent Venue Section Came Into Existence As a Special Exception to the General Venue Statute and Has Always Been So Applied.

The special venue section for patent cases was first enacted in 1897. Its history and reasons for enactment are reviewed in *Stonite Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942).

Briefly, the circumstances were that in 1887 the general venue statute had been amended to place restrictions on the places where civil actions could be brought, there having been great dissatisfaction with the unrestricted ability of a plaintiff to sue a defendant wherever he found him. However, widespread conflict soon arose as to whether this general venue provision applied to patent cases, and numerous cases held that it did not. This led to a special act, the Act of 1897*, to govern and restrict venue in patent cases. As was held in the *Stonite* case, the Act "was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights".

On the one hand, the framers of the Act restricted venue so that defendants could not be sued for patent infringement wherever they happened merely to be found—this had

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* *Mar. 3, 1897, C. 395, 29 Stat. 695:*

"An Act Defining the jurisdiction of the United States circuit courts in cases brought for the infringement of letters patent.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

resulted in oppression of accused infringers by patent owners.

On the other hand, they realized that there were special reasons both of justice and practical convenience why infringement cases should be tried where the infringement took place. Inspection of plant, processes and machinery is often important. Vital witnesses and records associated with the infringement are often located at the place of infringement. The Court itself frequently is asked to inspect the accused devices and processes in actual operation. As stated by the trial judge in *H. H. Miller Industries Co.* v. *Emery Thompson Mach. & Supply Co.*, 28 F. 2d 420, 422 (S. D. N. Y. 1928).

> "This being disputed by plaintiff's witnesses, it was arranged by agreement that the court, counsel, and witnesses should observe defendant's machine in actual commercial operation, and thereafter the results of that observation were testified to into the record.
>
> "From that testimony, and from that observation, I think it perfectly plain that defendant's device does, as plaintiff claims, perform . . ."*

So, under this Act two places were provided where a defendant might be sued for infringement—one, where defendant is an inhabitant, and the other, where it committed the alleged infringement, and had a regular and established place of business—and this was made to apply to all defendants "whether a person, a partnership, or corporation."

This has been the law ever since. It was re-enacted as § 48 of the Judicial Code in 1911 and has been embodied in the present code as § 1400(b). Throughout the 55 years since its enactment, it has been found satisfactory and wise.

* See also *Rowell* v. *William Koehl Co.*, 194 Fed. 446 (W. D. N. Y. 1912); *Consolidated Window G. Co.* v. *Window G. Mach. Co.*, 261 Fed. 362, at 365 (3 Cir. 1919); *Cowles Co.* v. *Frost White Paper Mills*, 77 F. Supp. 124, at 130 (S. D. N. Y. 1948), where the courts referred in their opinions to the importance of inspection of the machine either by court or counsel or both.

There has been no occasion to change it. Cases too numerous to mention have applied it to varying fact situations. It has been consistently applied to corporations to restrict venue either to the state of incorporation, or to the place where the infringement was committed and defendant had a regular and established place of business. See *Bowers* v. *Atlantic, G. & P. Co.*, 104 Fed. 887 (C.C.N.Y. 1900); *Bulldog Electric Prod. Co.* v. *Cole Electric Prod. Co.*, 134 F. 2d 545, 547 (C.C.A. 2, 1943); *Blaw-Knox Co.* v. *Lederle*, 151 F. 2d 973 (C.C.A. 6, 1945), and *Motoshaver, Inc.* v. *Schick Dry Shaver*, 100 F. 2d 236 (C.C.A. 9, 1938). As held by this Court in *General Elect. Co.* v. *Marvel Co.*, 287 U. S. 430 (1932), at 435, the patent venue section "confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them". Mere doing of business and mere license to do business have consistently been held not to confer jurisdiction in spite of the general rule as to corporate venue in non-patent cases. So clear has the matter been that in *Blaw-Knox* v. *Lederle*, 151 F. 2d 973 (1945), a case involving a corporate defendant, the Sixth Circuit Court of Appeals issued mandamus to enforce the statutory limitations.

There has been no reason for Congress to change this practical rule which has worked so well. The patent venue provision in correcting the abuse of a venue which was too broad included provision for suit where the tort was committed as well as in the place of residence. This has proved to be fair and adequate. Expansion of venue would result in the very evils the statute was designed to correct—namely, suits calculated to harass defendants in inconvenient locations but justified on technical venue grounds. It would also result in even greater possibility than now for conflict of decision between courts in patent cases and in even greater possibility than now for the perpetuation of patent litigation by multiple suits made possible by the additional jurisdictions for later suits against others after the patent was once adjudicated.

In the *Stonite* Case, This Court Held the Patent Venue Statute To Be the Exclusive Statute Governing Venue in Patent Infringement Cases.

The *Stonite* case (*Stonite Co.* v. *Melvyn Lloyd Co.*, 315 U. S. 561) was decided in 1942.

The question presented was the applicability to patent cases of the general venue statute which permitted defendants in adjoining districts to be sued in a single suit in either district. This section was then § 52* and is now § 1392. As will be seen from its language (see footnote), it literally applied to "every suit not of a local nature". This Court held that it was not supplementary to the patent section and that the patent venue section exclusively controlled patent infringement suits. This Court there said:

> "The only question presented for our determination is whether § 48 of the Judicial Code (28 U. S. C. § 109) is the sole provision governing the venue of patent infringement litigation, or whether that section is supplemented by § 52 of the Judicial Code (28 U. S. C. § 113)" (p. 561).
>
> * * *
>
> "We hold that § 48 is the exclusive provision controlling venue in patent infringement proceedings" (p. 563).

In the course of that decision, this Court was urged to hold that the re-enactment of the patent venue section in a single code with the general venue section made the sec-

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* (§ 52, Judicial Code; 28 U. S. C. 113). "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. * * *"

tions complementary. But this Court held the contrary (p. 567):

> "The reenactment of the Act of 1897 as § 48, and of R. S. § 740 as § 52 of the Judicial Code, by the Act of March 3, 1911, c. 231, 36 Stat. 1100-1101, is not indicative of any Congressional understanding that the two sections are complementary."

The applicability of the *Stonite* decision to the 1948 Code and to the present question is at once apparent and numerous lower Courts have applied it as controlling.*

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* In *Ackerman* v. *Hook*, 183 F. 2d 11 (1950), the Third Circuit Court of Appeals held (p. 14):

> "The Reviser's Notes make it evident that today, 1400(b) stands in the same situation as did Section 109 at the time of the Stonite opinion in 1942 and that the Stonite case is just as much in point now as then."

In *Nachtman* v. *Jones & Laughlin Steel Corporation*, 90 F. Supp. 739 (D. C. D. Col. 1950), the Court held (p. 940):

> "The Supreme Court, in the case of Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 62 S. Ct. 780, 86 L. Ed. 1026, has held that the patent infringement venue statute was enacted by the Congress as an exception to the general venue statute and not that the two sections are complementary. While this decision was based on a prior Act, 29 U. S. C. A. § 109, the basic principle enunciated therein remains the same under the present Code provision."

In *Fischer* v. *Karl*, 84 F. Supp. 53 (E. D. N. Y., 1949), Judge Kennedy held (p. 55):

> "But I find it difficult to believe that Congress, in enacting the new code, intended to overrule the Stonite decision. * * *
> "In a word, to grant this motion would be to render 28 U. S. C. A. § 1400(b) completely meaningless."

In *Arkay Infants Wear, Inc.* v. *Kline's, Inc.*, 85 F. Supp. 98 (W. D. Mo., 1949), the Court held (p. 100):

> "Being based on former Section 48 of the Old Code, supra, the legislative history of said section, as delineated in the Stonite case, supra, is apposite here. From the legislative history of said section, it is manifest that venue in patent infringement actions against a non-inhabitant of the district in which

(*Footnote continued on following page*)

In the present case, as in that case, the general venue statute which it is attempted to apply to patent cases is unrestricted in language and is literally broad enough to include all cases, patent cases as well as others. Here. as there, the general venue section and the patent venue section were part of a single enactment. Here, as there, the general statute seemed plain and unambiguous. Here, as there, the general statute is inconsistent with the special patent venue provision. Here, as there, the conclusion is that the two sections are not complementary.

Apart from its controlling effect on the present question this *Stonite* case is important in understanding why the drafters of the present code included general venue sections such as §§ 1391(c) and 1392 without stating that they did not apply to patent cases.

The *Stonite* decision had been the law for some years when the present code was adopted. The drafters of the

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such action is brought, was intended by Congress to be limited to districts in which such a defendant 'shall have committed acts of infringement and have a regular and established place of business.' To give effect to that mandate in Section 1400(b), the phrase 'any civil action' as used in Section 1392(a), supra, can have no application to patent infringement action. To hold otherwise would be to nullify and hold inoperative such limitation on venue of federal courts over that class of actions, and deprive defendants in patent cases of the privilege granted them by Congress to have such suits maintained against them in the district where they have committed acts of infringement and have a regular and established place of business."

In *Rava* v. *Westinghouse Electric Corporation*, 90 F. Supp. 707 (S. D. N. Y., 1950), the Court held (p. 708):

"Since the defendant is a Pennsylvania corporation, the suit is maintainable in this district only if the defendant has a regular and established place of business here and committed an act of infringement here. 28 U. S. C. A. § 1400(b); Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 62 S. Ct. 780, 86 L. Ed. 1026."

In *Curtis* v. *Madovoy*, 84 F. Supp. 637 (E. D. N. Y., 1949), Judge Galston stated (p. 638):

(*Footnote continued on following page*)

Code and Congress were entitled to rely on, and presumably did rely on, the settled law which it expressed—namely, that the patent venue section was the exclusive section for patent cases. There was no need for them to add to the general venue provisions a statement that they did not apply to patent cases. This was settled law.

Moreover, it was also settled law that the general rule as to corporate venue now expressed in § 1391(c) did not

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"Clearly that section would not enable the plaintiff in this case to bring in those defendants whose places of business are in the Southern District of New York in the absence of allegations that they have committed infringements in the Eastern District of New York. The controlling authority is Stonite Products Co. v. Melvin Lloyd Co., et al., 315 U. S. 561, 62 S. Ct. 780, 86 L. Ed. 1026."

Judge Igoe, in *Aetna Ball & Roller Bearing Co.* v. *The Federal Bearing Co., Inc.* (Civil Action No. 50-C-857), unreported, held:

"The question here, as I said awhile ago, is simply this: Does 1391-C or 1400-B control this situation? Now it would appear to me that at the time Congress adopted this amendment of the Judicial Code they might well presume to have known all there was to be known about the law concerning the cases of this kind, and in that provisions of the Judicial Code they address 1391-C which is a general provision covering all corporations, and at the same time, they adopted 1400-B which is a special provision covering patent cases. I think this case is covered by provision 1400-B. Therefore, your motion to quash the summons will be allowed."

In *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corporation* (S. D. Cal., 1950), 92 F. Supp. 16, Judge Harrison held (p. 19):

"In conformity with my conclusions I hold that Section 1391(c) is not complementary to Section 1400(b); that the word 'resides' in Section 1400(b) means the same as the word 'inhabitant' in the former Section 109, and that the interpretation placed upon said former Section 109 applies to its revision as set forth in the revised Section 1400(b). I believe the Stonite case is still the law and the fact that the defendant committed no acts of infringement in this district indicates to me that the venue is improper."

apply to patent cases. As early as 1939 this Court had decided that corporations might be sued not only where they were incorporated or where they did business, but additionally where they were licensed to do business, *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165 (1939). This, however did not change the rule in patent suits. Nor was there any reason why it should; the patent section had a special provision providing for suit where the tort was committed and had had since its very first enactment. Numerous cases after the *Neirbo* case held that the general rule of corporation venue did not apply to patent cases and the exclusive jurisdiction provided for by the patent venue section was so plainly undisturbed that, as we have said, the Sixth Circuit Court of Appeals in 1945 issued mandamus to ensure a corporate defendant of its protection, *Blaw-Knox Co.* v. *Lederle*, 151 F. 2d 973.

Under the clearly settled law that the rule of corporate venue did not apply to patent cases and the more fundamental and equally settled law that the patent venue was governed exclusively by the special patent venue section, why should the corporate venue section or any other general venue section recite that it did not apply to patent cases? Plainly there was no need.

This, then, was the history and state of the law in 1948 at the time of the enactment of the Code Revision. The patent venue section had been enacted as an exclusive section for patent infringement cases; it had been universally so applied; it had authoritatively been so construed; and it had been held unaffected by the extension of corporate venue. It fairly provided for suit at the place of residence and also at the place of infringement but wisely limited it thereto. All the Congress had to do was to incorporate it in the Code.

The Incorporation of This Section Into the 1948 Revision of the Judicial Code Changed Only Its Phraseology.

When this patent venue section was incorporated in the 1948 Revision of the Judicial Code some changes were made in language, and it is, of course, important to examine these to see whether any change was made in substance. Examination reveals there was not.

We quote here the Reviser's Notes* as a convenient and complete summary of the changes:

> "Subsection (b) is based on section 109 of title 28, U. S. C., 1940 ed., with the following changes:
>
> "Words 'civil action' were substituted for 'suit,' and words 'in law or in equity,' after 'shall have jurisdiction' were deleted, in view of rule 2 of the Federal Rules of Civil Procedure.
>
> "Words in subsection (b) 'where the defendant resides' were substituted for 'of which the defendant is an inhabitant.' A corresponding change was made in subsection (a). Words 'inhabitant' and 'resident,' as respects venue, are synonymous. (See reviser's note under section 1391 of this title.)
>
> "Words 'whether a person, partnership, or corporation' before 'has committed' were omitted as surplusage.
>
> "The provisions of section 109 of title 28, U. S. C., 1940 ed., relating to process are incorporated in section 1694 of this title. * * *"

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* These are quoted from the comprehensive volume (see p. 21, *infra*) devoted to the Act and its history put out by West Publishing Co. and Edward Thompson Co., which contains an outline of the history of the present revision; the lists of the congressional committees and other committees and staff who worked on the revision; the Act itself; the Senate Report and the House Report, including the Reviser's Notes; and the congressional debates.

Plainly no change in substance is involved in changing "suit" to "civil action"; or in omitting "in law or in equity"; or in omitting "whether a person, partnership, or corporation"; or in relegating the provisions re service of process to another section.

Equally plainly there is no indication of change in substance in the change from the term "inhabitant" to "resident". On the contrary, the Note states that *"Words 'inhabitant' and 'resident', as respects venue, are synonymous."*

This note under § 1400 (b) refers the reader to the reviser's notes under § 1391 in connection with the use of the synonymous terms "resident" and "inhabitant". There we find (*ibid.*, p. 1847):

> "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous. (See Ex parte Shaw, 1892, 12 S. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; Standard Stoker Co., Inc. v. Lower, D. C., 1931, 46 F. 2d 678; Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co., D. C., 1943, 49 F. Supp. 807.) * * *"

The net result is that there is nothing in either place to indicate any change in venue in patent cases.

The conclusion is inescapable, that the 50-year-old patent venue provision was re-enacted without any change in substance and that it remained, as was settled law at the time of enactment, the exclusive venue section for patent infringement cases.

There remain to be discussed the further confirmation found in the fact that the section governing service of process in patent cases confirms the independence of the patent venue provisions, in the fact that the corporate venue provisions cannot be applied to patent cases without doing violence to the patent venue provisions, and in

the fact that the legislative history and commentaries, as well as the Reviser's Notes, confirm the absence of change in this 50-year-old and well-settled patent venue policy.

The Section Governing Service of Process in Patent Cases Makes It Explicit that "Resides" in the Patent Venue Section Does Not Include, As It Does in the Corporate Venue Section, Districts Where a Corporation Is Merely Doing Business.

That portion of the patent venue section which provides for service of process in patent cases has become § 1694, as is observed in the reviser's note.* This section reads as follows:

> "§ 1694. Patent infringement action.
>
> "In a patent infringement action commenced in a district *where the defendant is not a resident but has a regular and established place of business,* service of process, summons or subpoena upon such defendant may be made upon his agent or agents conducting such business." [Italics added.]

It will at once be noted (and this, we think, is of controlling importance) that this section explicitly recognizes that, for patent infringement cases, the mere conducting of business in a jurisdiction does not make the defendant a resident thereof. This section explicitly recognizes and provides for the situation where "the defendant is not a resident but has a regular and established place of business". It provides that in such case, service may be made upon defendant's "agents conducting such business".

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* From Reviser's Note under § 1400(b). "The provisions of section 109 of title 28, U. S. C., 1940 ed., relating to process are incorporated in section 1694 of this title * * *"

This section, in referring to a case where defendant is not a resident of the district, though doing business therein, is in direct conflict with § 1391(c).

What clearer and more convincing evidence could be wanted of the error of petitioner's contention that the corporate venue section applies to patent cases merely because of its broad language?

However, further confirmation, if more be needed, is found in the irreconcilable inconsistency between § 1391(c) and § 1400(b), which becomes apparent when the language of one is applied to the other.

The Corporate Venue Section Cannot Be Applied to the Patent Venue Section Without Doing Violence to the Patent Venue Section.

When it is attempted to apply the corporate venue definition of residence in § 1391(c) to the patent venue section, it quickly becomes apparent that a vital part of § 1400(b) becomes meaningless and surplusage.

Let us assume the infringement action is being brought against the corporation in a district where it is doing business and it is attempted to justify this on the ground that the patent section says any defendant may be sued where it "resides" and the corporate venue section so defines residence.

No difficulty is encountered when only the first clause of § 1400(b) is considered.

When, however, the second portion of § 1400(b) is examined, it is discovered that *this has resulted in suing a defendant where it does business but does not infringe, contrary to the express provision of this second clause of § 1400(b) that the defendant must have not only a place of business in the district but also must have infringed in the district before jurisdiction attaches under this clause.*

To hold jurisdiction under such circumstances makes the second clause meaningless and surplusage.

This becomes apparent upon considering what the wording would be like if the statute were rewritten to include § 1391(c) as follows:

> "§ 1400(b) revised to include § 1391(c): Any civil action *against a corporate defendant* for patent infringement may be brought in the judicial district where the defendant resides, *to wit, in the judicial district in which it is incorporated or licensed to do business or is doing business,* or where the defendant has committed acts of infringement and has a regular and established place of business." [Italicized portion supplied from § 1391(c).]

If it be attempted to reconcile this by saying that the second clause of § 1400(b) can be construed to include only individuals, there arises the immediate difficulty that this construction runs counter to the natural and settled meaning of the term. The statute prior to revision read, "defendant, whether a person, partnership, or corporation, had committed, etc." and the reviser's note points out that "Words 'whether a person, partnership, or corporation' before 'has committed' were omitted as surplusage. Further, there is also the absurdity that the word "defendant" has to mean two different and inconsistent things in its two occurrences in the same sentence. In its first occurrence "defendant" has to include corporations and in its second occurrence it has to exclude corporations.

Plainly, the only sensible answer to these difficulties is the one that all else points to, namely, that § 1391(c) and § 1400(b) are not complementary. They simply weren't intended to modify one another.

The patent section was intended to continue to be just what it was under settled law at the time of the code enactment—an independent section for patent infringement cases.

Examination of the Legislative History Confirms the Lack of Intention to Change Patent Venue.

A convenient source of the legislative history is the special compilation put out by West Publishing Co. and Edward Thompson Co., as pages 1487-2174 of "U. S. Code, Congressional Service, 80th Congress, second session".* This is devoted to "Title 28—United States Code, Judiciary and Judicial Procedure, with Official Legislative History and Reviser's Notes". Also, the article "The Judicial Code—1948 Revision" by William W. Barron, Chief Reviser, appearing in 8 F. R. D. 439 is helpful.

The history of the legislation and also the reviser's notes were reviewed by this Court in *Ex Parte Collett*, 337 U. S. 55 (1949) in connection with another section of the code, and the Court there found and held that the legislative history and the reviser's notes were illuminating and authoritative and confirmed the view which the Court had arrived at for other reasons. Such a consideration of the legislative history is, of course, eminently proper.**

It is at once apparent from consideration of legislative history that the revisers took the greatest pains to make

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* This is also published as an appendix to Vol. I, U S. Code Congressional Service 1948, but the paging is different, namely pages A3 to A322, incl.

** It is general rule that reference to legislative history is proper, even where the statute appears to be plain and unambiguous on its face. As this Court said in *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943):

> "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."' *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543-44."

(*Footnote continued on following page*)

sure that everyone concerned with the revision could know at all times exactly what changes were made. To this end, explicit notes, called "reviser's notes" were prepared, listing all changes and so important were they considered that they were appended to and made a part of the House report on the bill. As the Second Circuit Court of Appeals said in *Lavin* v. *Lavin*, 182 F. 2d 870, 873 (1950):

> "The House report incorporated the Reviser's notes, and thus made them a valid source for interpretation, in addition to their inherent authority."

This Court, in *Ex Parte Collett*, pages 65, *et seq.*, comments on the fact that the revision involved prolonged study over a period of five years; that the spade work was entrusted to two law book publishing firms; that there was an advisory committee including distinguished judges and members of the Bar; an advisory committee appointed by the Judicial Conference; and an advisory committee appointed by Chief Justice Stone. This Court in its opinion repeatedly refers to the carefully prepared reviser's notes, and emphasizes (p. 69) that the reviser's notes were before

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(*Footnote continued from previous page*)

And in *United Stdtes* v. *American Trucking Ass'ns, supra,* the Court said (310 U. S. at pp. 543-544):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one '*plainly at variance with the policy of the legislation as a whole*' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'. * * *" (Emphasis added.)

Congress in enacting the legislation, and that they were printed for the purpose of aiding the Congress and its committees in considering and enacting the legislation.

Senator Wiley, in reporting the bill to the Senate, said (*ibid.*, p. 1676):

> "Appended to the report are the revisers' notes to each section, together with accompanying tables. These explain in great detail the source of the law and the changes made in the course of the codification and revision."

Mr. Robsion, in submitting the revision to the House, stated (*ibid.*, p. 1699):

> "The reviser's notes are keyed to sections of the revision and explain in detail every change made in text."

In view of the great care which was exercised to include all changes in the reviser's notes, one would naturally expect to find a reference to change in patent venue policy if one was intended. But, we have already seen from an examination of the reviser's note under the patent venue section, § 1400(b), that there was no statement of any change whatsoever except a change in phraseology which was frankly stated to be merely phraseology.

Where, as here, we find that every other factor points to the lack of change in patent venue, it is not only fair but irresistible to conclude that the absence of any statement of change in the reviser's note confirms the fact that no change was intended particularly since the legislative history is replete with statements that the purpose was codification and that changes were avoided except where plainly non-controversial and that all changes were set forth in the reviser's notes.

Beyond this, however, there are other indications in the legislative history that confirm that no change in patent venue was intended. Numerous witnesses testified, but none indicated any change in patent venue. They all emphasized that changes were minimized and that all changes were in the notes. The testimony of Representative Keogh (p. 1945); Judge Maris (1959); Mr. Barron, Chief Revisor (1964) and Moore (1969).

Neither the Senate report nor the House report indicate any change. The House report comments on venue changes but states they will be found in the notes. It states (p. 1697):

> "So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under sections 1391-1406."

This lack of indication of any change in patent venue must be contrasted with the situation which the Court found in *Ex Parte Collett*, where the change was explicitly stated in the notes.

It also must be contrasted with the situation in connection with § 1398 where the reviser's note explicitly states (p. 1850):

> "This section is completely rewritten to give effect to changes recommended by the Judicial Conference of the United States."

and, furthermore, is to be contrasted with the note applying to Subsection (d) of § 1391 itself which states (p. 1848):

> "Subsection (d) of this section is added to give statutory recognition to the weight of authority con-

> cerning a rule of venue as to which there has been a sharp conflict of decisions."

Before leaving our consideration of the reviser's notes, we should like to comment on the lack of any note indicating that § 1391(c) represents a change. The lack of any such note is easily understood when it is realized that this section did not introduce any change in venue, but merely reflected the settled law that corporations could be sued generally in the district where they did business or in the district where they were licensed. As we have pointed out previously, not only was this the settled law at the time of the preparation and enactment of the code, but it was also settled law that this rule of venue as to corporations did not apply to patent infringement suits. Further, it was settled law that the patent venue section was independent, and exclusively governed patent infringement suits. Hence, there was no reason why the drafters of the code, in incorporating this settled law as to corporations, should have treated it as a change or should have been concerned with its application to patent cases or made any note with respect thereto.

Conclusion

Finally, we reiterate that the special patent venue provisions have worked well and fairly, that there has been no evidence of any desire or reason to change them, that expansion of venue in patent cases would serve no good purpose and that there are significant reasons, which we have previously pointed out, why expansion would be unwise. As this Court said in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947):

> "But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under tempta-

tion to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."

Dalton v. *Shakespeare Co.*, 196 F. 2d 469 (C. A. 5, 1952), *C-O-Two Fire Equipment Co.* v. *Barnes*, 194 F. 2d 410, 415 (C. A. 7, 1952—Dissenting Opinion, Lindley, J.), and *Farr Co.* v. *Gratiot*, 92 F. Supp. 320 (S. D. Cal. 1950), the authorities which have read the provisions of § 1391(c) into § 1400(b), have not only ignored these considerations of convenience and avoidance of harassment, underlying reasons for the creation of a special patent venue statute and for the maintenance of an independent status for that statute from 1897 down to the present time. They have not considered the controlling effect of the reasoning in the *Stonite* case. They have ignored the fact that the provisions of § 1391(c) and § 1400(b) were the content of settled law at the time of their adoption and that the settled law at such time was that they were not complementary, the rule of venue for corporations generally, not applying to patent infringement actions. They have not considered, in the light of reality, the inconsistent result arrived at by any application of § 1391(c) to § 1400(b). They have wholly ignored the important fact that § 1694, relating to service of process in patent infringement actions, contains explicit provisions which are in direct conflict with the provisions relating to corporate residence in § 1391(c).

Consideration of these factors compels the conclusion that, as held by the Court below, § 1391(c) is not complementary to § 1400(b); that the District Court was without power to entertain the present action over respondent's objection; and that the Court of Appeals' action in ordering the District Court either to dismiss or to transfer the

case to a jurisdiction where it might properly be brought should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Petitioner has consistently urged that under the plain language employed by Congress the Congressional definition of corporate residence in Section 1391(c) applies to Section 1400(b) (Petitioner's Brief, pp. 8-18). This position adheres to the rule which has been invariably applied by this Court and most recently re-announced in *Ex parte Collett,* 337 U. S. 55, 69 S. Ct. 944 (1949), which is that the plain words and meaning of a statute cannot be overcome by legislative history. Nowhere in its brief has respondent asserted any ambiguity or even denied that the language of the statutes involved is clear, plain and

direct. Indeed, respondent concedes that upon a first reading the language of the two statutes Section 1391(c) is applicable to Section 1400(b) Respondent's Brief, p. 6). But, like the Court of Appeals below which found the statutory language clear and unambiguous (194 F. (2d) 410, R. 21), respondent ignores the admonition of this Court in *Ex parte Collett, supra,* and proceeds outside of the statutory language in an attempt to find that Congress did not mean what it said.

Respondent's Brief is a striking example of the strained efforts by which respondent, and the courts upon whose decisions respondent relies, (including the majority of the Court of Appeals below) have sought to make unclear the plain and unambiguous language deliberately chosen by Congress "out of the experience of the past and carefully defined for the future." As the Court of Appeals for the Fifth Circuit unanimously said in *Dalton* v. *Shakespeare Company,* 196 F. (2d) 469, 472 (1952):

> "• • • Indeed it seems to us that the difficulties arise not out of the words the statute used but out of the strained efforts to make them read otherwise than as they do."

Practically all of the arguments advanced in Respondent's Brief were fully overcome in Petitioner's Main Brief. It is only necessary here that some of the errors in respondent's position be considered.

Respondent (Brief, pp. 8-10, 25) urges that the enactment of the predecessor section to Section 1400(b), to wit, Section 109, was for the purpose of preventing oppression which would result if a corporate defendant were sued in a district other than that of its incorporation or where it had an established place of business and had committed acts of infringement. This contention ignores the fact

that since the enactment of Section 109 the mode of doing business by corporate entities has changed dramatically. Many corporations do business on a nationwide basis and have practical existence in many states other than that of incorporation. Often the state of incorporation means nothing more than the corporation having a legal existence there. For example, the affidavit of respondent's president submitted in support of its motion to dismiss in the District Court shows that the State of Delaware, wherein the respondent is incorporated, knows no more of respondent than documents indicating its existence filed in the offices of that state (R. 11-12). The activities of the respondent are conducted in states other than that of its legal existence. Congress was aware of the changed nature of corporate locations. It wisely took cognizance of the practical existence of corporations in states where they are doing business and where they are licensed to do business.

Respondent suggests no reason why a corporation sued for patent infringement should be entitled to special consideration any more than it should be in other types of legal actions. Oppression, if any exists, would be as great or as small in a patent infringement action as it would in any other tort action. Further, Section 1404, provides for transfer of civil actions for the convenience of parties and witnesses in the interest of justice.

Respondent cites (Brief p. 11) *Stonite* v. *Melvin Lloyd Co.*, 315 U. S. 561, 62 S. Ct. 780 (1942) as controlling the present situation. Respondent contends that the law was unchanged when the patent venue section there under consideraion was incorporated in the 1948 revision of the Judicial Code. Petitioner has never denied that Section 1400(b) controls venue in patent infringement actions. Petitioner does contend, however, that the change

of the word "inhabitant" to "resides" in Section 1400(b) together with similar changes in other sections of the venue chapter of the Judicial Code to make uniform the residence requirement in all venue provisions of the Code, and the insertion of a new definition of corporate residence for "venue purposes" is significant. This careful and deliberate action of Congress in drafting the venue provisions of the Code shows clearly that the definition of residence of Section 1391(c) applies wherever residence is a requirement for venue.*

Respondent does not answer petitioner's submission (Petioner's Brief, pp. 23-24) that the *Stonite* decision can not in any event control here because the two venue provisions there under consideration by this Court were mutually exclusive under the facts of that case. Respondent (Brief, p. 13), attempts to draw an anology between the *Stonite* case and the case at bar in saying that "Here, as there, the general statute is inconsistent with the special venue provision." There is no inconsistency in the instant case. Respondentd oes not undertake to show any inconsistency between Sections 1391 (c) and 1400(b).

Asserted as "settled law" by the respondent (Brief, p. 14) is that the "general rule as to corporate venue" is "now expressed in Section 1391(c)" and that general rule did not apply to patent cases (Respondent's Brief, pp. 14-15). Both propositions are erroneous.

Contrary to respondent's argument, this Court in *Neirbo* v. *Bethlehem Corporation*, 308 U. S. 165, 60 S. Ct. 153 (1939) did not decide that corporations could be sued where they did business or where licensed to do business. The *Neirbo* case merely decided that a corporation could waive its

* The venue provisions enacted by Congress in the 1948 revision of the Judicial Code are set out in an appendix at the end of this brief.

then existing privilege of being sued only in the state of incorporation, by complying with a statute of a state and as a condition of doing business within it designating an agent upon whom service of process could be made. It was not decided in that case that the doing of business constituted a waiver of venue requirements. Further, the definition of corporate residence found in Section 1391(c) was not settled law prior to the 1948 revision of the Judicial Code. This Court expressly held to the contrary.

In *Suttle* v. *Reich Brothers Co.*, 333 U. S. 163, 168, 68 S. Ct. 587 (1947), this Court said with reference to the *Neirbo* case:

> "• • • But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in Sec. 51 of the Judicial Code, the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit 'was not brought "in the district of the residence of either the plaintiff or the defendant."' ".

So, Congress when it enacted Section 1391(c) as a definition of corporate residence could not have been expressing settled law.

Respondent (Brief, pp. 18-19) asserts that Section 1694, which relates to service of process in patent suits, "is of controlling importance" and "explicitly recognizes" that "the mere conducting of business in a jurisdiction does not make the defendant a resident thereof". Respondent concludes that this section is therefore in direct conflict with Section 1391(c) insofar as corporate defendants in patent cases are concerned. The conclusion that there is a direct conflict is based on a false premise. Section 1694 does not state, as respondent implies, that conducting of business in a jurisdiction never makes the

defendant a resident thereof. Section 1694 does recognize that there may be instances in patent infringement cases in which the conducting of business in a jurisdiction does not make the defendant a resident thereof and provision is made for service of process in such instances. Examples, of course, are individuals, co-partnerships and associations. But a corporate defendant does become a resident of a district in which it is licensed to do business or is conducting business. This is clearly and unequivocally stated in Section 1391(c).

Respondent asserts (Brief, pp. 19-20) that if the plain language that Congress employed is adhered to a portion of Section 1400(b) "becomes meaningless." Respondent, in support of its argument, rewords Section 1400(b) to include Section 1391(c). This rewording, however, ignores all types of defendants other than corporations. This attempted revision is startling in view of respondent's admitted ability to understand the clear meaning of the two sections on a "first reading" (Respondent's Brief, p. 6). On page 6 of Respondent's Brief, the task is simple; on page 20, it becomes impossible.

Respondent's argument that the second portion of Section 1400(b) becomes meaningless if Section 1391(c) is utilized in defining the first portion thereof contains a basic error. Respondent argues that the only solution to the problem it manufactures is that the second clause of Section 1400(b) be construed to include "only individuals" and that would result in the term "defendant" including corporations in the first portion of Section 1400(b) and excluding corporations in the second portion (Respondent's Brief, p. 20). Respondent errs in its hypothesis. Petitioner has made and now makes no such argument. The second portion of Section 1400(b) can and does apply to all defendants, including corporations. No violence is

done to that portion of the statute because a corporation having a regular and established place of business in a district might also be a resident under the definition of Section 1391(c). How can inconsistency or confusion arise simply because the same facts satisfy both of two alternatives? (See Petitioner's Brief, pp. 19-20)

Respondent sets forth the reviser's notes under Section 1400(b) and one of the notes under Section 1391 (Brief, pp. 16-17). Significantly, however, respondent has omitted to point out that the note under Section 1391 (which is set forth in full) on its face relates only to Sections 1391(a) and (b), which provide for venue in certain types of actions without regard to the character of the defendants involved. Section 1391(a) governs the venue in diversity cases; Section 1391(b) controls the venue in non-diversity cases. On the other hand Section 1391(c)—the section here involved—relates to venue only as to a particular kind of defendant but without regard to the type of action, *i.e.* corporate defendants; and Section 1391(d) relates to alien defendants, but again regardless of the type of action. Thus, the reviser's notes on this point are of no significance.

CONCLUSION.

The Court below conceded that the language employed by Congress was clear, plain and unambiguous. Respondent concedes that it can understand the two statutes involved after but "a first reading." The efforts of the Court of Appeals below and the respondent to show that Congress did not mean what it said cannot prevail.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

Chapter 87 Title 28
District Courts; Venue

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

§ 1392. Defendants or property in different districts in same State.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

§ 1393. Divisions; single defendant; defendants in different divisions

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

(b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions.

§ 1394. Banking association's action against Comptroller of Currency

Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located.

§ 1395. Fine, penalty or forfeiture

(a) A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found.

(b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.

(c) A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any district into which the property is brought.

(d) A proceeding in admiralty for the enforcement of fines, penalties and forfeitures against a vessel may be brought in any district in which the vessel is arrested.

(e) Any proceeding for the forfeiture of a vessel or cargo entering a port of entry closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection, or of any vessel or vehicle conveying persons or property to or from such State or section or belonging in whole or in part to a resident thereof, may be prosecuted in any district into which the property is taken and in which the proceeding is instituted.

§ 1396. Internal revenue taxes

Any civil action for the collection of internal revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return is filed.

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

§ 1398. Interstate Commerce Commission's orders

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

§ 1399. Partition action involving United States

Any civil action by any tenant in common or joint tenant for the partition of lands, where the United States

is one of the tenants in common or joint tenants, may be brought only in the judicial district where such lands are located or, if located in different districts in the same State, in any of such districts.

§ 1400. Patents and copyrights

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

§ 1401. Stockholder's derivative action

Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.

§ 1402. United States as defendant

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

§ 1403. Eminent domain

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts.

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

§ 1405. Creation or alteration of district or division

Actions or proceedings pending at the time of the creation of a new district or division or transfer of a county or territory from one division or district to another may be tried in the district or division as it existed at the institution of the action or proceedings, or in the district or division so created or to which the county or territory is so transferred as the parties shall agree or the court direct.

§ 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. As amended May 24, 1949, c. 139, Sec. 81, 63 Stat. 101

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petition for Rehearing

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

Petitioner respectfully prays that this Court grant rehearing of its order of October 27, 1952, affirming by an equally divided court the judgment of the United States Court of Appeals for the Seventh Circuit.

The order of this Court affirming the Court of Appeals for the Seventh Circuit, while it is conclusive upon the parties to this case, is not "an authoritative determina-

tion for other cases", *United States* v. *Pink*, 315 U.S. 203, 216 (1942); *Hertz* v. *Woodman*, 218 U. S. 205, 213-214 (1910). Thus the order of this Court leaves unresolved the conflict between the decision of the Court of Appeals for the Seventh Circuit and the decision of the Court of Appeals for the Fifth Circuit in *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (1952).

Similar conflicts exist in decisions of District Courts (See Brief for Petitioner, pages 12-13, 18, 26).

The application of venue statutes to corporations in Federal courts has long presented difficulty. In *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168-169 (1939), this Court said:

> "When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law."

This Court's decision in the *Neirbo* case summarizes the history of the metaphorical judicial reasoning by which such procedural problems were approached. The decision was that although the defendant corporation did not "reside" in a district other than that in which it was incorporated, it could be sued in any Federal district in which it had consented to be sued in State courts by appointing an agent for the service of process as a condition for securing a license to do business in a state.

Subsequently this Court in *Suttle* v. *Reich Brothers*, 333 U.S. 163, 168 (1948), made it clear that the *Neirbo* decision did not change the settled law that the residence of a corporation within the meaning of the venue statutes was only in the state of its incorporation; and this Court

pointed out that Congress had similarly understood and employed the word "residence".*

A few months after this Court's decision in the *Suttle* case, Congress passed the new Judicial Code and took the final step which broadened the meaning which both Congress and this Court had given to corporate "residence" for over half a century. Whereas in March, 1948,

* "The 'residence' of a corporation within the meaning of these statutes has frequently been the subject of consideration by this Court for a period of over half a century. Shortly after Congress had enacted § 51 of the Judicial Code in substantially its present form, this Court declared that the 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated.' Thus, in Shaw v. Quincy Min. Co. 145 U.S. 444, 450, 36 L. ed. 768, 771, 12 S. Ct. 935 (1892), it was said: 'This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicil, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.'

"For almost sixty years, in an unbroken line of decisions, this Court has applied the same construction. That view was reaffirmed as recently as 1946 in the opinion of the Court in Mississippi Pub. Corp. v. Murphree, 326 U.S. 433, 441, 90 L. ed. 185, 189, 66 S. Ct. 242.

"Congress has revealed a similar understanding of the term 'residence' when enacting special venue statutes in situations in which it was intended that, at the election of the plaintiff, a corporation should become amenable to suit either in the State of incorporation or in States in which it is carrying on corporate activities. In those statutes, Congress has provided that the venue of such suits should be located not only in the district in which the corporation is a 'resident' or an 'inhabitant,' but also in districts in which it may be 'found', 'transacts business,' or has an agent to receive service of process.

"Nor does the decision of this Court in Neirbo Co. v. Bethlehem Shipbuilding Corp. 308 U.S. 165, 84 L. ed. 167, 60 S. Ct. 153, 128 ALR 1437 (1939) require that the term 'residence' be construed differently. In that case, the plaintiffs, citizens and residents of New Jersey, brought suit based on diversity of citizenship against the defendant, a Delaware corporation, in the Southern District of New York. This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code, the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit 'was not brought "in the district of the residence of either the plaintiff or the defendant."' "
(333 U.S. 163, 166-168)

this Court stated the existing law that "the 'residence' of a corporation, within the meaning of the venue statutes is only in 'the state and district in which it has been incorporated'" (333 U.S. 166), Congress declared that effective September 1, 1948 "any judicial district in which * * * (a corporation) is incorporated or licensed to do business, or is doing business * * * shall be regarded as the residence of such corporation for venue purposes" (28 U.S.C. 1391(c)).

Congress thus recognized and provided for the realities of corporate activities in more than one state. The opinion of the Court of Appeals for the Seventh Circuit has disregarded the clear statutory enactment.

In providing for venue in patent cases, Congress has never granted to corporations special privileges or immunity from process. Likewise in the new Judicial Code, no distinction is made between a corporation and a natural person. Either may be sued where it resides.

The history of the patent venue acts is reviewed in *Stonite Products Co.* v. *Lloyd Co.*, 315 U.S. 561 (1942) and in *Re Hohorst*, 150 U.S. 653 (1893). From 1789 (1 Stat. at L. 79) until the Act of 1887 (24 Stat. at L. 552), venue existed in the District in which the defendant was an inhabitant or "was found". No distinction was made between natural persons and corporations. No distinction was made between patent cases and other cases. By the Act of 1887, the general venue provisions were amended limiting venue to the residence of the defendant except in diversity cases in which it might also be laid in the residence of the plaintiff. Conflicting decisions then occurred on the question of whether venue in patent cases was restricted by the restrictive Act of 1887. This conflict was laid at rest by the special Act of 1897 (29 Stat. at L. 695) providing that in patent cases venue could be had not only

in the district of residence of the defendant, as in the general venue statute, but also in a district in which infringement had occurred, and the defendant had a regular and established place of business. This Act expressly recognized that the same rule was to be applied to every defendant "whether a person, partnership or corporation'. Since 1897, venue in patent cases has, therefore, been *broader* than the general venue.

In amending and re-enacting the patent venue provision (28 U.S.C. 1400(b)), there was no intent to distinguish between natural persons and corporations. Each may be sued where he or it resides. Where the defendant is a natural person, the effect of the decision of the Court of Appeals for the Seventh Circuit is to leave venue in patent infringement actions broader than the general venue, but where the defendant is a corporation, the effect of the decision is to provide for the first time venue against a corporation in a patent infringement action which is narrower than the general venue provision as to corporations—whereas in other actions a corporation may be sued in whatever districts it resides, in patent infringement actions, this cannot be done. This result is reached even though the patent venue section specifically provides that it is residence and not state of incorporation which determines venue.

The result of this Court's order is to grant a special immunity to corporations within the several districts of the Seventh Circuit, whereas that immunity is denied to corporations within the several districts of the Fifth Circuit by virtue of *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (C.A. 5, 1952). In the remaining districts in other circuits, one suing a corporate defendant under any of the special venue statutes will not know without suit whether the prospective corporate defendant is to be granted a special immunity or not. Until this Court

speaks, the confusion will continue as to whether a corporation resides where Congress clearly and unambiguously stated its residence to be "for venue purposes", or whether the silence of the Reviser's Notes and speculations as to what Congress may have intended, but did not say, shall control.

Petitioner respectfully submits that granting of this Petition for Rehearing and an authoritative determination of the issue for other cases is of real importance to the Federal Courts, litigants and the bar. However, in the event that rehearing still would result in an equally divided Court, Petitioner prays that this Court grant it permission to apply to the Court of Appeals for the Seventh Circuit for rehearing, including permission to apply for rehearing *en banc*. The Court of Appeals for the Fifth Circuit, before reaching its decision in *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (1952) had the opportunity to consider the majority and minority opinions of the Court of Appeals for the Seventh Circuit. In the event that the issue cannot be resolved by this Court, Petitioner desires to afford the Court of Appeals for the Seventh Circuit the opportunity to re-examine its decision and to consider the decision in *Dalton* v. *Shakespeare Company*.

Respectfully submitted,

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ANDREW J. DALLSTREAM,

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Attorneys for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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Attorney for Petitioner

No. 25. CARDOX CORPORATION *v.* C-O-TWO FIRE EQUIPMENT CO. Certiorari, 343 U. S. 925, to the United States Court of Appeals for the Seventh Circuit. Argued October 21–22, 1952. Decided October 27, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *George I. Haight* argued the cause for petitioner. With him on the brief were *Andrew J. Dallstream* and *Frederic H. Stafford*. *R. Morton Adams* argued the cause for respondent. With him on the brief were *Irving Herriott* and *Edward T. Connors*. Reported below: 194 F. 2d 410.